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IN THE

Supreme Court of the United States

..... TERM, 1965

NO. 481

IN RE: PETITION OF BABCOCK BOULEVARD LAND COMPANY, INC., FOR THE APPOINTMENT OF VIEWERS TO ASCERTAIN THE DAMAGES ARISING FROM THE CONSTRUCTION OF L. R. 765, SECTION 3A IN ROBINSON TOWNSHIP, ALLEGHENY COUNTY, PENNSYLVANIA

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APPEAL OF RED JACKET COMPANY, INC.

PETITIONS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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PETITION FOR WRIT OF CERTIORARI

Petitioners Babcock Boulevard Land Company, Inc., and Red Jacket Company, Inc., by their counsel, John B. Nicklas, Jr., of McCrady & Nicklas, pray that a writ of certiorari issue to review the orders of the Supreme Court of Pennsylvania, affirming the orders of the Court of Quarter Sessions of Allegheny County, Pennsylvania.

Questions Presented.

OPINIONS BELOW

The Report of the Board of Viewers was filed on April 5, 1960. The opinion of the Court of Quarter Sessions of Allegheny County, Pennsylvania, was filed on September 25, 1964. The Supreme Court of Pennsylvania filed Per Curiam opinion on May 25, 1965. These opinions are appended hereto in accordance with Rule 23 subparagraph 1 (a) (1) of your Honorable Court.

JURISDICTION

The orders of the Supreme Court of Pennsylvania were entered on May 25, 1965.

Jurisdiction of the Court is invoked under 28 U.S.C.A. 1257 (2) and 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

I. Is the deprivation of a property owner's right of access to his land (either total or partial) a property right within the meaning of the Fifth and the Fourteenth Amendments to the United States Constitution, and therefore compensable if interfered with by the Commonwealth of Pennsylvania?

Negatived by the court below.

II. Is Section 8 of the Limited Access Highway Act of May 29, 1945, P.L. 1108 (36 P.S. 2391), which denies compensation to a property owner unless some of his property is actually taken, a violation of due process, and therefore unconstitutional and void?

Negatived by the court below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment XIV to the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 28 U.S.C. Const. Amend. 14.

Amendment V to the Constitution of the United States:

". . . nor shall private property be taken for public use, without just compensation." 28 U.S.C. Const. Amend. 5.

Article 1, §10, Clause 1:

". . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." 28 U.S.C. Const. Art. 1, Sec. 10.

Article 1, §10 of the Pennsylvania Constitution:

"No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. No person shall, for

the same offense, by twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Penna. Purdons Art. 1, Sec. 10.

Article 16, §8 of the Pennsylvania Constitution:

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." Penna. Purdons Art. 16, Sec. 8.

Section 8 of the Limited Access Highway Act of May 29, 1945, P.L. 1108 (36 P.S. 2391.8):

"* * * The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by a change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken. * * * For the purpose of constructing limited access highways, local service highways, or intersections, streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided."

STATEMENT OF THE CASE

Certiorari is sought in these cases to review the Orders of the Supreme Court of Pennsylvania affirming the Court of Quarter Sessions of Allegheny County, Pennsylvania, which denied appellant property owners damages for deprivation of right of access to Ramp A and the Parkway West (a limited access road) by the Department of Highways of the Commonwealth of Pennsylvania which erected a permanent barricade across the same in front of petitioners' property, although the property owners had been using it for more than five (5) years. The Board of Viewers, the Quarter Sessions Court and the Pennsylvania Supreme Court all held that under Art. I, Sec. 10 of the Pennsylvania Constitution and the Limited Access Highway Act of May 29, 1945, P.L. 1108 (36 P.S. 2391) no damages could be awarded the property owners because no physical land or dirt had been taken and further, that the barricading off of the Ramp, thereby depriving the property owners of access to the Parkway West, was non-compensable under the police powers of the State Highway Department.

At Nos. 2 and 3 November Sessions, 1959, Road Docket, Court of Quarter Sessions of the Peace of Allegheny County, Babcock Boulevard Land Co., Inc. (hereinafter called "Babcock") and Red Jacket Co., Inc. (hereinafter called "Red Jacket"), respectively, filed Petitions for Viewers to assess damages against the Commonwealth of Pennsylvania (Department of Highways) for shutting off access to Ramp A to Parkway West on October 9, 1957.

Viewers were appointed, heard testimony, and disallowed appellants any damages, holding that the action

of the Commonwealth, did not constitute a condemnation and taking of any part of claimants' property; that said action by the State Highway Department was in accordance with the provisions of Section 4 of the Limited Access Highway Act of 1945, P.L. 1108 (36 P.S. 2391); that claimants' right to recover must rest upon some constitutional or statutory provision and, in the absence of such, there can be no damages imposed on the Commonwealth. (R. pp. 71a-73a, 94a, 97a).

Exceptions to the Viewers' Report were timely filed in the Court of Quarter Sessions of Allegheny County, Pennsylvania, and appellants also filed timely appeals to the Court of Common Pleas of Allegheny County at Nos. 1445 and 1446 July Term, 1960. The Commonwealth filed motions to quash those appeals to the Common Pleas Court on the theory that appellants had no right to a trial by jury for the ascertainment of damages since as a matter of law there was no actual physical taking of ground and consequently no damages could be awarded. After oral orgument and written briefs, the Common Pleas Court en banc (Aldisert and Smart, JJ.) denied the motions to quash, but ordered said appeals not be listed for trail by jury until the questions of law raised by the exceptions in Quarter Sessions Court should be finally adjudicated, without prejudice to the Commonwealth to renew its motions to quash following such final adjudication. Consequently, the appeals in the Common Pleas Court are being held in abeyance.

The question of whether deprivation of Petitioners right of access by the Commonwealth was a compensable property right within the meaning of the Fifth Amenment and Fourteenth Amendment to the United States

Constitution was presented both in the written briefs and oral argument on the exceptions filed to the Board of Viewers Report before Quarter Sessions Court. The Quarter Sessions Court dismissed the exceptions, and in its opinion, stated that while the Fifth Amendment is applicable to the states through the Fourteenth, these were inapplicable with regard to the issue of access rights when the Commonwealth is the condemnor. (Record p. 113a, p. 121a).

An Appeal was taken to the Pennsylvania Supreme Court where questions of the applicability of the Fifth and Fourteenth Amendment were again submitted in both the written brief and oral arguments before the Court. A Per Curiam Opinion was filed affirming the Quarter Sessions Court Orders on May 25, 1965.

The facts involved in the instant petitions are as follows:

(a) Petitioners are the owners of respective commercial tracts of land in Robinson Township, Allegheny County, Pennsylvania, abutting on a public highway known as Parkway West. Babcock Boulevard Land Company, Inc. acquired title to its property by deed from George Peat et ux. dated December 19, 1952, recorded in Deed Book Vol. 3255, page 27; Red Jacket Company, Inc. acquired title to its adjoining tract by deed from Babcock Boulevard Land Company, Inc. dated November 30, 1954, recorded in Deed Book Vol. 3591, page 614. The Babcock Company's commercial tract is unimproved; the Red Jacket tract has erected thereon a commercial building in which Red Jacket conducts its business.

(b) On June 2, 1950, the Commonwealth of Pennsylvania located and constructed in Allegheny County a limited access highway designated as L. R. 765, Section 3A, popularly known as the Penn-Lincoln Parkway West. At what was to be known as the Rosslyn Farms Interchange, located at the boundary line between Rosslyn Farms Borough and Rosslyn Township, Ramp A was planned and actually constructed. At the time of the condemnation of June 2, 1950, all of the property now owned by Babcock and Red Jacket was owned by an individual named George Peat.

(c) On June 23, 1952, George Peat, predecessor in title to the commercial land now owned by petitioners, made a settlement with the Commonwealth of Pennsylvania for the approximately 8 acres of his land appropriated by the Commonwealth for the sum of $8,000, and executed Form 474-B of the Commonwealth titled "Deed of Release and Quitclaim, Limited Access Highway," whereby he released "the Commonwealth or any agency or political subdivision thereof for or on account of any taking, injury or destruction of property or by reason of the improvement of said road * * * or by reason of the deprivation of the right of access, egress and ingress to and from the section of highway, or through or by reason of the subsequent maintenance thereof according to the standards of the Department of Highways. A plan showing the proposed improvement is hereto attached and made part of this release." The plan attached to the release provides for access to Ramp A to the Penn-Lincoln Highway. The following legend also appears on the back of the plan.

"LIMITED ACCESS HIGHWAY

This print is made from Sheet No. 12, of right-of-way plan for Route No. 765, Section No. 3A, Allegheny County, approved by the Governor on June 2, 1950, which I have examined and had explained to me this 23rd day of June, 1952, and is to be attached to the release herewith executed.

S/ Philip L. Meyer Witness

S/ George Peat Seal"

(d) Peat subsequently conveyed all of his land to Babcock, which in turn later conveyed a portion thereof to Red Jacket, which erected a factory building thereon and used Ramp A for access to the Parkway until October 9, 1957, when a plan revision was signed by the Governor of the Commonwealth and a barricade was erected across Ramp A, thereby depriving Red Jacket, as well as Babcock, from access thereto.

(e) As a result of barricading petitioners' property from Ramp A, Red Jacket can only gain access to its commercial building by an inaccessible road by a circuitous three-mile route through the Borough of Carnegie which is steep, precipitous, inaccessible and unimproved, and involves the use of a jeep to carry its merchandise in and out of the plant to the bottom of a hill and thence loading and unloading onto trucks at considerable expense and inconvenience because of the inaccessibility of ingress and egress.

(f) Babcock Company, one of the petitioners, also filed a civil action in the United States District Court for the Western District of Pennsylvania at No.

16973, against Louis M. Stevens, Secretary of Highways of the Commonwealth, and George M. Leader, Governor of the Commonwealth, seeking injunctive relief to force said defendants as officials of the Commonwealth to remove the barricade of Ramp A. Hearing thereon was held September 25, 1958, before Staley, McIlvaine and Marsh, JJ., at the conclusion of which it was agreed by counsel for Babcock Company and for the defendants that decision should be delayed by the court until after the United States Supreme Court had acted in the case of Park H. Martin, Successor to Joseph Lawler as Secretary of Highways of the Commonwealth of Pennsylvania et al. v. Creasy et al. 360 U.S. 219. In the Creasy case the United States Supreme Court held that it could not take jurisdiction because the property owner had not first exhausted his remedies in the Pennsylvania Courts.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

The Deprivation of Petitioners' Access to Ramp A by the Commonwealth Without Just Compensation Is Violative of the Fifth and Fourteenth Amendments of the United States Constitution.

It seems crystal-clear (and the Opinion of the lower court agrees) that there has been a radical change in Pennsylvania decisions from the early decisions which denied a property owner damages unless land or dirt was actually taken, under the wording of Article I, Section 10 of the Pennsylvania Constitution, and that later decisions have recognized consequential damages and incorporeal rights as compensable. *Soldiers' and Sailors' Memorial Bridge,* 308 Pa. 487 (162 Atl. 309, 310); Appointment of Viewers to Assess Damages to Property of Roland A. McCrady, 399 Pa. 586 (160 A. 2d 715).

As Mr. Justice Holmes said in his opinion in *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393 (in which he declared Kohler Act of May 27, 1921, P.L. 1198 unconstitutional):

> "While such regulations may not physically take the property, they do so regulate its use *as to deprive the owner of a substantial right therein without compensation.* 'We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change': White's Appeal, 287 Pa. 259, 266, 134 A.409" (emphasis supplied).

In *Martin v. Creasy*, 360 U.S. 219, Creasy obtained an injunction against the Superintendent of Highways of the Commonwealth of Pennsylvania in the United States District Court for the Western District of Pennsylvania (Marsh, J.) to enjoin the Department of Highways from denying him access to the Parkway West. The United States Third Circuit Court affirmed, but the United States Supreme Court reversed only because it held that Creasy should first exhaust his remedy in the Pennsylvania courts. The court's opinion, however, makes it clear that a property owner should not be deprived of his right of access without compensation because of the difference in the language between *Article I, Section 10* and *Article XVI, Section 8 of the Pennsylvania Constitution*, nor under the provisions of *Section 8* of *the Limited Access Highways Act of 1945* (as discussed under Point II of this Brief). The decision indicates that access is a compensable right, the confiscation of which, by the Commonwealth, without compensation is violative of the Fifth and the Fourteenth Amendments of the Federal Constitution. The majority opinion was delivered by Justice Stewart:

> "There is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property.' If, after all is said and done in the Pennsylvania courts, any of the plaintiffs believe that the *Commonwealth has deprived them of their property without due process of law, this Court will be here*" (emphasis supplied).

We respectfully submit that the Creasy opinion above quoted completely supports petitioners' view, for here petitioners find themselves in a situation anticipated

by the United States Supreme Court with respect to the Parkway West.

Mr. Justice Douglas of the United States Supreme Court believed that the delay and expense of first should be avoided and that the United States District Court and the Circuit Court of Appeals were correct in assuming jurisdiction. Mr. Justice Douglas stated:

> "* * * We have at bottom in this case a question whether access to a highway is a property right which is compensable under the Fifth and Fourteenth Amendments. If it is compensable, as the District Court ruled, see 160 F. Supp. 404, 410-412, this is the most appropriate time to make the announcement. Particularly is this so when appellees in this case sought a declaration by the state court of their rights under the statute and were told that 'their constitutional rights, whatever they may be, will be guarded and protected.'
>
> * * * * * * *
>
> "That question concerns not state law but a concept imbedded in the Bill of Rights. It is in no way entangled with local law. The Supremacy Clause of the Constitution makes all local projects bow to that concept of 'property'".

The opinion of the court below dismisses the Fifth and Fourteenth Amendments of the United States Constitution and the decisions of the Supreme Court of the United States — *United States v. Causby*, 328 U.S. 256; *Griggs v. Allegheny County*, 369 U.S. 84, and *Martin v. Creasy, supra* — holding that the wording of Article I, Section 10 of our Pennsylvania Constitution should pre-

vail over the Federal Constitution and the Federal decisions.

The lower court opinion also erroneously assumes that there must be a total deprivation of an existing right of access in order for the property owner to have a compensable action in damages (R. 129a, 130a).

However, it is clear that *Martin v. Creasy, supra,* rejects the proposition that loss of total access is a prerequisite before a right of action accrues in the property owner. In *Creasy,* Mr. Justice Douglas stated:

> "Whether or not the landowners will be left landlocked or given access to substitute service roads goes only to the question of the amount of property 'taken', if any. *It has nothing to do with the question of the landowner's property right in access to a highway abutting his land"* (emphasis supplied).

The court below further states (R. 127a):

> "Common sense would indicated that there was no intent that the plan should confer on George Peat a contract right. * * * the Commonwealth be required to surrender its police power over that portion of the Parkway to his discretion."

We concede and there can be no doubt that the Commonwealth should and did retain its right to revise the plan whenever, in the exercise of its power of eminent domain under the Limited Access Highway Act, it cared to do so; but this should not deprive appellants of compensation from the Commonwealth for the appropriation of appellants' access rights to Ramp A.

As stated in: — In *Cincinnati v. Louisville R.R. Co.*, 223 U.S. 390:

> "This clause [Art. I, Sec. 10, Clause 1] is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated."

The consideration for the execution and delivery of the Deed and Release by Peat was the payment by the Commonwealth to him of $8,000 and the grant of access rights to Ramp A as graphically shown on the plan attached thereto; thus a property right in Peat and his successors in title was established.

In *Creasy* (160 F. Supp. 404 U.S. Dist. Ct. Western Dist. of Pa.) Judge Marsh said:

> "The Pennsylvania Limited Access Highway Act as applied to them (the plaintiffs) is violative of the Fourteenth Amendment of the United States Constitution in that it deprives them of their property without due process of law, and denies them the equal protection of the laws. See *Del. L. & W. R.R. v. Morristown*, 276 U.S. 182 (1928), at 193, for a discussion of compensation as an element of due process; see also 16A C.J.S. Con. Law paragraph 646."

It seems clear that the Legislature cannot deprive a property owner of his constitutional right to damages

simply by the passage of an act which attempts to eliminate or restrict that right. The requirement of due process is not satisfied merely by legislative declaration that no remedy is available (as in the Limited Access Highways Act).

In *Rich Rill v. Bashore,* 334 Pa. 449, at 478, the Court said:

> "Although the legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove * * * certain fundamental rights which have been always recognized and observed in judicial procedures."

In short, the Assembly may not define a confiscatory taking as lawful and thus by definition defeat the requirements of the Fourteenth Amendment.

In *Donovan v. Penna. Co.,* 199 U.S. 279, 301, 302 (1905) the Supreme Court of the United States, in discussing the right of abutting property owners to access to a street or road, said:

> "'* * * The right may be regarded in the nature of an incorporeal hereditament.' * * * The general doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to ligitimate public regulation, is as much his property as his right to the soil within its boundary lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.'"

In *Breinig v. Allegheny County,* 332 Pa. 474, at 480, the Pennsylvania Supreme Court said:

> "Where land is taken or purchased for highways, the abutting owner retains, as an incident to ownership of the remainder of his land, the right of access, or of ingress and egress. This right cannot be taken from him unless compensation is made therefor under the law. *It is a property right, protected by the Constitution"* (Emphasis supplied)."

To the same effect *Stuart v. Gimbel Brothers,* 285 Pa. 102, *Griggs v. County of Allegheny,* 369 U.S. 84 (402 Pa. 411) 168 At. 2d 123).

The court below concedes that an abutting property owner's right of access is a property right or an *easement appurtenant* but it nevertheless concludes that Babcock and Red Jacket have not been injured because no *dirt or land* was actually taken by the Commonwealth (Department of Highways) on October 9, 1957, when it barricaded off petitioners from access to Ramp A. The court says:

> "The basic issue before the court is whether or not the 'easement' of access is a property right for the deprivation of which the Commonwealth is liable in damages under Article I, Section 10 of its Constitution" (Opinion, p. 113a).

The opinion then compares the language of Article I, Section 10, which it admits is substantially identical to the Fifth Amendment to the Federal Constitution, to Article XVI, Section 8, of the Pennsylvania Constitution.

The court below then concludes that "Article I, Section 10, applies to both the Commonwealth and those to

whom it delegates this power, while Article XVI, Section 8, applies only to 'municipal and other corporations and individuals' " (citing cases). * * *

"Thus in the absence of any statutory assumption of liability, the Commonwealth as condemnor is required to make compensation for property *taken,* but apparently is not under the same compulsion where property is *injured or* destroyed" (Opinion 115a).

The lower court then reaches a startling and inconsistent conclusion (123a):

"While we concur both in the holding that there need no longer be a physical appropriation of land to constitute a taking of property, and that access is a property right by virtue of Article XVI, Section 8 and various legislative enactments applicable to 'municipal and other corporations and individuals', *we cannot agree that this amounts to a declaration that access is a compensable property right where the condemnor is the Commonwealth.*" (Emphasis supplied).

It is petitioners' contention that the distinction thus drawn between these two sections of the Pennsylvania Constitution is unsound, fallacious and violative of petitioners' constitutional rights.

The Commonwealth contends that the act of the Secretary of Highways and the Governor of Pennsylvania on October 9, 1957, in barricading of petitioners' property from Ramp A, was a lawful exercise of police power and does not constitute a taking of property. The Commonwealth argues, further, that petitioners' consti-

tutional rights are not violated because petitioners have other means of access to Bell Road. We respectfully submit that, although petitioners may have access by an unsatisfactory and circuitous route to their properties from the back streets of Carnegie, nevertheless they have suffered the loss of a property right by reason of the Department of Highways barricading them off from the Parkway West. Compensation for loss of access to a main artery by an abutting property owner, as in the instant cases, is not dependent upon their having no other means of access.

In *Appointment of Viewers to Assess Damages to Property of Roland A. McCrady,* 399 Pa. 586, 160 A.2d 715, the Governor and Secretary of Highways of the Commonwealth of Pennsylvania condemned a strip of ground along both sides of the triangular plot of ground owned by McCrady at the intersection of U.S. Route 20 and Pa. Highway Route 5, in Springfield Township, Erie County, Pennsylvania. A curb ranging in height from 6 inches to 12 inches on the outside of the triangular plot was erected, thereby creating an island, which deprived the owner of access to his gasoline station and restaurant erected on said piece of ground. He was forced to move both buildings back in order to make them usable. The Supreme Court affirmed the verdict of $27,500 in favor of the property owner, which included consequential damages for the injury, necessitating the moving of the gas station and restaurant. Mr. Justice B. R. Jones, speaking for the Pa. Supreme Court (1960), quoted *White's Appeal,* 287 Pa. 259, as follows:

> "Police power should not be confused with that of eminent domain. Police power controls the use

of property by the owner for the public good, its use otherwise being harmful, while eminent domain * * * takes property for public use. Under eminent domain, compensation is given for property taken, injured or destroyed, while under the police power, no payment is made for diminution of use, even though it amounts to an actual taking or destruction of property."

In the *McCrady* case, the Commonwealth further relied on Section 420 of the Highway Law of 1945, P.L. 1242, Article IV (36 P. S. 670-420), which empowers the Secretary of Highways to make reasonable rules and regulations governing the use of all State highways, and, by the construction of curbs, divisor strips, painted lines or signs, etc., to control the direction of the flow of traffic thereon. In other words, the Commonwealth contended that it could not be liable in damages since it erected the curbing around the McCrady property under its police powers. This argument was also rejected by the Supreme Court, viz."

"What the Commonwealth attempts to do is clear and evident: *under the guise of the police power it seeks to accomplish indirectly that which it cannot accomplish directly.* The Commonwealth attempt to justify the curbing as an exercise of its police power and the taking as an exercise of its power of eminent domain in an attempt to escape liability for the damages which appellee so obviously suffered, cannot be condoned." (emphasis supplied).

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

cut than the constitutional way of paying for the change.

"Absolute and unlimited police power is one of the twin pillars on which Communism and every totalitarian regime and every dictatorship is based, maintained and kept in power. It is a doctrine and a power which is repungant to our Birthright of Liberty, our Constitution, our traditions and our American Way of Life." (Key Realty Co. Appeal, 408 Pa. 98).

II

Section 8 of the Limited Access Highway Act of May 29, 1945, P. L. 1108 (36 P.S. 2391.8) Which Denies Consequential Damages Where No Property Is Taken, Is Violative of Due Process.

A. Section 8 of the Limited Access Highway Law of 1945 reads as follows:

"* * * The owner or owners of private property affected by the construction or designation of a limited access highway shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken. * * *"

The Commonwealth's position is that, by virtue of the Limited Access Highway Law of 1945, it is only liable where land or dirt is actually taken. On the other hand, it is appellants' contention that the aforesaid language in Section 8 of the Limited Access Highway Law uses the word "property" as distinguished from the use of the word "land". "Property" is a general term and

would include incorporeal hereditaments, easements, and any and all property rights; hence, to construe the word "property" as synonymous with "land" is erroneous.

Had the Legislature intended this narrow construction, it would have used the terminology "land" or "real property". If, on the other hand, the Legislature meant to identify or equate the term "property" with "land", then its clear intention was to deprive appellants or any other citizen of compensation for the loss of incorporeal property rights of egress and ingress to or across a limited access highway, contrary to the Fifth and Fourteenth Amendments of the Federal Constitution, in that it would deprive citizens of their property without due process of law.

The Pennsylvania Court has recognized that a taking is compensable under eminent domain, without necessarily including the physical appropriation of land: *Gardner v. Allegheny County,* 382 Pa. 88, 116 (114 A. 2d 491, 1955). In the Gardner case, airplanes flew below the air space devoted to the general public and the Pennsylvania Court held that "the use of any part of an owner's property is a taking of it." In the concurring opinion of Mr. Justice Stearne, the case of *U. S. v. Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, was cited with approval as follows:

> "When airplanes habitually fly so low as to dangerously interfere with the use and enjoyment of property adjacent to or adjoining air fields, whether authorized or not, it constitutes a taking of property for which compensation may be allowed."

Thus in *Griggs v. County of Allegheny,* 369 U. S. this was presented with a statute purporting *to place the*

glide paths into airports in the public domain, and also with an interference with a landowner's use and enjoyment of his property caused by constant low flights over his land. In his opinion in *Griggs,* Mr. Justice Douglas recognized the existence of this statutory provision, *but summarily dismissed it* by quoting from *Causby* that the use of land presupposes the use of some of the airspace above it.

The holding in *Griggs* is clearly that a landowner's constitutional right to just compensation for taking of his property cannot be avoided *by a Congressional declaration as to the limits of navigable airspace.*

Accordingly, the Griggs case settles once and for all the proposition that landowners must be compensated for easements taken over their property. The measure of damages is the depreciation in value of the property as a result of the taking of such air easements. *Johnson v. Airport Authority of the City of Omaha,* 173 Neb. 801, 115 N. W. 2d 426 (1962); *Jensen v. United States,* 305 F. 2d 444 (Ct. Cl. 1962); *Dick v. United States,* 169 F. Supp. 491 (Ct. Cl. 1959); *United States v. 1040.30 Acres of Land,* 144 F. Supp. 299 (W. D. La. 1956); *United States v. 48.10 Acres of Land,* 144 F. Supp. (S.D.N.Y. 1956).

That a state court may define property rights and that the Supreme Court of the United States will not question such definition, *Sauer v. New York,* 206 U.S. 536 (1907) has obviously been strictly limited by such subsequent decisions as *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393. That case is one of the milestones in the development of the protection afforded by the federal courts to private persons against the invasion of their rights by state legislatures under the guise of the

police power. In that case, the United States Supreme Court held that the State of Pennsylvania could not constitutionally under the aegis of the police power deprive the owners of unmined coal of their right to damage the surface of the land by removing the coal. Justice Holmes said, at page 415: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

B. Section 8 of the Statute here under attack provides, *inter alia*, as follows:

> "For the purpose of constructing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided."

The Limited Access Highways Act of 1945 denies to appellants equal protection of the laws. The statute expressly provides a procedure by which the Secretary of Highways may purchase property for constructing limited access highways; it is silent concerning his authority to purchase property upon conversion of an existing road to a lmited access highway. It would appear that the Legislature by this significant omission has placed a large class of land owners, including appellants, beyond the pale.

Appellants believe that this language creates a completely arbitrary discrimination between owners of land abutting newly constructed highways and those abutting existing highways. This statute reveals no express procedure by which a land owner, upon deprivation of access alone, may bring a claim before a Board of

Viewers. Indeed the viewers, as well as the quarter sessions court have denied appellants their right to initiate proceedings from compensation.

Another discrimination appears when the present statute is compared with the act which authorized the Pennsylvania Turnpike, a pioneer in the development of limited access: Act of May 21, 1937, P. L. 774, No. 211. (36 Purdons Pennsylvania Statutes Annotated, Section 652, *et seq.*) By that statute the Turnpike Commission was authorized and empowered to acquire by condemnation: "Any lands, rights, easements, franchises or other property deemed necessary or convenient for the construction or efficient operation of the turnpike in the matter hereafter provided." The General Assembly thus provided for compensation to property holders for damages arising from the loss or deprivation of access. The discrimination appears when we compare the quoted language of the Turnpike law with another clause of the same section 8 of the Limited Access Highway Act: "The Commonwealth shall not be liable for consequential damages where no property is taken". There is no reasonable distinction between property owners who reside along a non-access highway entitled The Pennsylvania Turnpike and the property only a few miles distant along a highway known as the Greater Pittsburgh Airport Parkway.

There is a third and, appellants believe, a most extreme discrimination, practically unparalleled in the law, in Section 8 of the Limited Access Highways Act.

> "The Commonwealth shall not be liable for consequential damages where no property is taken; Provided, however, that the Secretary of Highways

> shall have authority to enter into agreement for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance."

That section authorizes the Secretary of Highways to pay damages for the loss of access in some cases but not in others. If municipal authorities decide that they have a moral obligation to pay for the loss of access, or a political obligation, or a personal favor to pay, they may make this municipality liable for payment of said damages, and the Secretary of Highways may decide to contribute funds of the Commonwealth to such payment. What is or is not a compensable property right then will be determined in each instance by the discretion of local political authorities. Access may thus be a compensable property right in one landowner and not in his neighbor. Such a flagrant statutory authorization of discrimination seems unique in the history of the law of eminent domain. It is a reasonable interpretation of the statute to predict that local policy will favor friends and punish enemies with complete freedom by resolving to pay or not to pay for the taking of access.

The fortunate owners of abutting property who would be compensated for their loss of access would be those with sufficient political or other influence upon local governing bodies to prevail upon them to pass the required "proper resolution or ordinance". No chopping of logic can justify this wholesale delegation to any person or agency. Furthermore, the statute is silent regarding what proportion of damages the Secretary may decide to pay in the instances where contribution is

made. Here again the political status of individuals affected and other factors completely beyond the control of the law may govern.

It might well be argued that when the legislature conferred this privilege upon the Secretary of Highways it recognized, in a sort of left-handed way, that such right of access is a compensable property right; otherwise why permit such payment, even on a discriminatory basis?

This indefensible discrimination between owners itself would be sufficient to refute appellee's argument that the police power will support the statute under attack. The police power does not justify arbitrary discrimination anymore than it justifies deprivation of property, as set forth earlier. *Pennsylvania Coal Company v. Mahon, supra.* 260 U.S. 393 (Holmes)

This Court should not interfere with a legislative classification which is based upon any reasonable difference: *Williamson v. Lee Optical of Oklahoma,* 348 U. S. 483 (1955); but as stated in *Morey v. Doud,* 354 U. S. 457, 464:

> "'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.' Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 37-38, 48 S. Ct. 423, 425, 72 L. Ed. 770; Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U. S. 459, 462, 57 S. Ct. 838, 840, 81 L. Ed. 1223 * * *. A statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is

found. Smith v. Cahoon, 283 U. S. 553, 51 S. Ct. 582, 75 L. Ed. 1264."

Again, comparing the Limited Access Highway Act with the Pennsylvania Highway Act of June 1, 1945, P. L. 1242, § 523 (36 P. S. 670-523), the latter statute assures the affected property owners of damages from one source or another; whereas the former act (the Limited Access Highway Act) makes recovery contingent upon not just one, but two completely voluntary acts; first, that of the governing body of the particular township, borough, city or county where the deprivation of access takes place, and second, that of the Secretary of Highways. In the instant case, the Secretary of Highways and the Governor of Pennsylvania have deprived appellant property owners of access without compensation.

CONCLUSION

The Department of Highways of Pennsylvania should not be permitted to abrogate its contract with Peat, petitioners' predecessor in title, by destroying access to Ramp A and the Parkway West under guise of the Commonwealth's Police Power; nor should petitioners summarily be denied due process under the erroneous assumption that the Limited Access Highway Act of 1945 and Article I, Section 10 of the Pennsylvania Constitution supersede the Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

JOHN B. NICKLAS, JR.
McCRADY & NICKLAS
Attorneys for Petitioners

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: PETITION OF BABCOCK BOULEVARD LAND COMPANY, INC., FOR THE APPOINTMENT OF VIEWERS TO ASCERTAIN THE DAMAGES ARISING FROM THE CONSTRUCTION OF L. R. 765, SECTION 3A IN ROBINSON TOWNSHIP, ALLEGHENY, PENNSYLVANIA APPEAL OF BABCOCK BOULEVARD LAND COMPANY, INC.	No. 85 March Term, 1965
IN RE: PETITION OF RED JACKET COMPANY, INC., FOR THE APPOINTMENT OF VIEWERS TO ASCERTAIN THE DAMAGES ARISING FROM THE CONSTRUCTION OF L. R. 765, SECTION 3A IN ROBINSON TOWNSHIP, ALLEGHENY COUNTY, PENNSYLVANIA APPEAL OF RED JACKET COMPANY, INC.	No. 86 March Term, 1965

Opinion of the Court

Filed May 25, 1965

Orders affirmed.

Per Curiam.

Musmanno, J. dissents.

Report of Viewers

No. 2 November Sessions, 1959

(Filed April 5, 1960)

To the Honorable, the Judges of Said Court:

The undersigned Viewers, appointed by your Honorable Court in the above entitled case for the purpose set forth in the praecipe herewith returned, respectfully report:

That having given notice as required by law of the time and place fixed by the Court for viewing said premises, to-wit: December 3, 1959, at 10:30 A.M., they met thereon on the date and at the said time and viewed the premises and road located and constructed thereon, and then and there adjourned to meet at the Hearing Room of the Viewers in the City-County Building, Grant Street, Pittsburgh, Pennsylvania, on the 17th day of February, 1960, at 9:30 o'clock, A.M. for the purpose of hearing the testimony of the parties in interest.

Pursuant to said adjournment, they met at the time and place fixed and heard all the evidence offered by the parties interested and their witnesses, both the claimants and the Commonwealth of Pennsylvania being represented by Counsel.

After hearing and considering the said testimony the Viewers do now find and report as follows:

That on October 9, 1957, the said BABCOCK BOULEVARD LAND COMPANY, INC., was the owner of a tract of land situated in ROBINSON TOWNSHIP, Allegheny County, Pennsylvania, particularly described in the Petition in this proceeding, said land abutting on the Penn Lincoln

Parkway West as show on Viewers' Plan marked Exhibit 4, and State Highway Plan marked Exhibit 1-A, both being attached to this Report and made part hereof; that through said tract of land is a Township road known as Bell Road, extending from Carnegie Borough through Robinson Township and now intersecting with Ramp "A" of said Penn Lincoln Parkway.

It is alleged by the claimant herein that on October 9, 1957, the Secretary of Highways and the Governor of the Commonwealth of Pennsylvania proceeded to deprive claimant of certain alleged property rights in said tract by closing, with a barrier, the entrance from the tract via Bell Road to Ramp "A" of the Parkway, and that said closing accomplished a condemnation and thereby making claimant's land valueless.

Based on an examination of the Viewers' Plan and the State Highway Plan and consideration of the testimony before this Board, it is the opinion of the Viewers that said action does not constitute a condemnation and taking of any part of claimant's property. That said action in no way interferes with the tract of land abutting Bell Road, but it only amounts to a change in ingress and egress to the Parkway by traversing Bell Road in a different direction than formerly. That said action by the State Highway Department was in accordance with the provision of Section 4 of the Limited Access Highway Act of 1945, P. L. 1108.

It is the opinion of the Viewers that claimant's right to recover must rest upon some constitutional or statutory provision, and in the absence of such there can be no liability for damages imposed on the Commonwealth. Consequently claimant's right to damages is

refused. However, the Viewers' award to T. J. McGovern, the sum of ONE HUNDRED FIFTY and no/100ths ($150.00) DOLLARS for engineering services rendered in the preparation of the Viewers' Plan, said sum to be payable by the Commonwealth of Pennsylvania.

All of which is respectfully submitted this 5th day of April, 1960.

H. S. DOUGLASS
JOHN J. O'KEEFE
CHARLES M. HALLORAN
Viewers

Report of Viewers

No. 3 November Sessions, 1959

(Filed April 5, 1960)

To the Honorable, the Judges of Said Court:

The undersigned Viewers, appointed by your Honorable Court in the above entitled case for the purpose set forth in the praecipe herewith returned, respectfully report:

That having given notice as required by law of the time and place fixed by the Court for viewing said premises, to-wit: December 3, 1959, at 10:30 o'clock, A.M., they met thereon on the date and at the said time and viewed the premises and road located and constructed thereon, and then and there adjourned to meet at the Hearing Room of the Viewers in the City-County Building, Grant Street, Pittsburgh, Pennsylvania, on the 17th day of February, 1960, at 9:30 o'clock, A.M. for the purpose of hearing the testimony of the parties in interest.

Pursuant to said adjournment, they met at the time and place fixed and heard all the evidence offered by the parties interested and their witnesses, both the claimant and the Commonwealth of Pennsylvania being represented by Counsel.

After hearing and considering the said testimony the Viewers do now find and report as follows:

That on October 9, 1957, the said RED JACKET COMPANY, INC., was the owner of a tract of land situated in ROBINSON TOWNSHIP, Allegheny County, Pennsylvania, particularly described in the Petition in this proceeding, said land abutting on the Penn Lincoln Parkway West as shown on Viewers' Plan marked Exhibit 1, and attached to this Report and made part hereof; that abutting said tract of land is a Township road known as Bell Road, extending from Carnegie Borough through Robinson Township and now intersecting with Ramp "A" of said Penn Lincoln Parkway.

It is alleged by the claimant herein that on October 9, 1957, the Secretary of Highways and the Governor of the Commonwealth of Pennsylvania proceeded to deprive claimant of certain alleged property rights in said tract by closing, with a barrier, the entrance from the tract via Bell Road to Ramp "A" of the Parkway, and that said closing accomplished a condemnation and thereby making claimant's land valueless.

Based on an examination of the Viewers' Plan and the State Highway Plan and consideration of the testimony before this Board, it is the opinion of the Viewers that said action does not constitute a condemnation and taking of any part of claimant's property. That said action in no way inteferes with the tract of land abut-

ting Bell Roard, but it only amounts to a change in ingress and egress to the Parkway by traversing Bell Road in a different direction than formerly. That said action by the State Highway Department was in accordance with the provision of Section 4 of the Limited Access Highway Act of 1945, P. L. 1108.

It is the opinion of the Viewers that claimant's right to recover must rest upon some constitutional or statutory provision, and in the absence of such there can be no liability for damages imposed on the Commonwealth. Consequently claimant's right to damages is refused. However, the Viewers' award to T. J. McGOVERN, the sum of FIFTY and no/100ths ($50.00) DOLLARS for engineering services rendered in the preparation of the Viewers' Plan, said sum to be payable by the Commonwealth of Pennsylvania.

All of which is respectfully submitted this 5th day of April, 1960.

H. S. DOUGLASS
JOHN J. O'KEEFE
CHARLES M. HALLORAN
Viewers

Opinion

No. 2 November Sessions, 1959

No. 3 November Sessions, 1959

(Filed September 25, 1964)

Before: ALDISERT, BROSKY and PRICE, JJ.

ALDISERT, J.

The petitioner in each of the above cases is the owner of property abutting a limited access highway whose right of access thereon has been taken away by virtue of a physical barricade which the Commonwealth erected at the intersection of a public road and that highway.

The cases are before the Court on exceptions filed by the petitioners to the Reports of the Board of Viewers. Since identical issues are presented in each case, they will be treated as one.

At No. 2 November Sessions, 1959, Road Docket, Babcock Boulevard Land Company, Inc. (hereinafter called Babcock) filed its Petition for Viewers in the Court of Quarter Sessions of Allegheny County, alleging a condemnation of Babcock's property by the Commonwealth and requesting the appointment of viewers to assess damages.

At No. 3 November Sessions, 1959, Road Docket, a similar Petition for Viewers was filed by Red Jacket Company, Inc. (hereinafter called Red Jacket).

In both cases viewers were appointed, viewed the property involved, heard testimony and arguments, and filed Reports which were confirmed *nisi* on April 5, 1960.

The viewers in each case refused the claims of the petitioners for damages on the grounds that the action of the Commonwealth did "not constitute a condemnation and taking of any part of claimant's property", that the "action by the State Highway Department was in accordance with the provisions of Section 4 of the Limited Access Highway Act of 1945, P.L. 1108", and that in the absence of some constitutional or statutory provision, no liability for damages can be imposed on the Commonwealth.

The official transcripts of the testimony before the Board of Viewers have been made a part of the record in each case by orders of court consented to by all parties.

Pursuant to a plan approved by the Governor on June 2, 1950, the Commonwealth of Pennsylvania located and constructed in Allegheny County a limited access highway designated as Legislative Route 765, Section 3A, and popularly known as the Penn Lincoln Parkway West (hereinafter called Parkway).

This Parkway consists, for the most part, of two separate one-way roadways. One roadway (hereafter called Roadway East) extends East to Pittsburgh where it joins the Penn Lincoln Parkway East; the other roadway extends West to the Greater Pittsburgh Airport (hereafter called Roadway West). The only means of egress and ingress to the Parkway is by the use of various interchanges located at points along its route.

A portion of this Parkway is the result of incorporating an existing highway and converting it to one of limited access. The remaining portions, including the area material to these cases, were newly located and constructed.

At a point near the boundary line between Rosslyn Farms Borough and Robinson Township, at what is now known as the Rosslyn Farms Interchange, a one-way limited access ramp allowing ingress to the Roadway East only, designated Ramp A, was planned and actually constructed. At this point both the Parkway and Ramp A intersect, at roughly a 45° angle, a township road called Bell Road.

Bell Road originates in the Borough of Carnegie where it joins Bell Avenue and the general system of streets. Before the construction of Ramp A. and the Penn Lincoln Parkway West, it extended in a northerly direction through Robinson Township and into and through Rosslyn Farms Borough. It was laid out as a public road in proceedings at No. 5 June Sessions, 1852 of this court and afforded the properties of Babcock and Red Jacket access to the general system of streets in both directions. Bell Road remains a public road today even though there is testimony that its present condition makes passage thereon very difficult.

As a result of the construction of Ramp A at the Rosslyn Farms Interchange, Bell Road was terminated at the southern right of way line of Ramp A instead of continuing north into Rosslyn Farms Borough as it had previously. It now became possible to proceed from Bell Road and turn right onto Ramp A, and then onto the Roadway East, or to proceed from Rosslyn Farms east on Ramp A and turn right onto Bell Road.

Babcock's property lies on both sides of Bell Road with its northern boundary abutting on Ramp A and the Roadway East. In addition, it appears that this peti-

tioner also owns a tract of land on the other side of the Parkway abutting the Roadway West.

Red Jacket's property lies between and abuts both Bell Road and the Roadway East. Both properties were, at the time of the 1950 condemnation owned by an individual named George Peat.

On June 23, 1952 George Peat, petitioners' predecessor in title, for and in consideration of the sum of $8,000.00 executed and delivered to the Commonwealth of Pennsylvania a "Deed of Release and Quitclaim—Limited Access Highway", in which he released the Commonwealth of all claims "for or on account of any taking, injury, or destruction of property, through or by reason of the improvement of the said road (Legislative Route No. 765, Section 3A) * * * or through or by reason of the deprivation of the right of access, egress ingress to and from the section of highway, or through or by reason of the subsequent maintenance thereof according to the standards of the Department of Highways". A highway plan, prepared by the Commonwealth, showing the proposed improvement and the extent of the right of way to be taken was expressly made part of this Deed.

By this deed and plan the Commonwealth condemned and duly compensated the owner, George Peat, for that portion of his property shown by the plan to be required for the location and construction of Ramp A and the Parkway, and for all claims that would arise on account of this condemnation. The plan, besides showing the portion of Peat's property to be taken and injured, also contained data and specifications showing in exact detail how the proposed improvement would affect the

entire general area. The plan disclosed the right of way and slope requirements affecting the properties of other owners as well as the access point at the intersection of Bell Road with Ramp A. This access point was shown to be and is within the right of way taken by the Commonwealth.

Subsequently, Peat conveyed this property to Babcock Boulevard Land Company, Inc., which in turn later conveyed a portion thereof to Red Jacket Company, Inc.

On October 9, 1957, pursuant to a plan revision approved by the Governor, the access point at the intersection of Ramp A with Bell Road was closed by a physical barricade.

The result was the creation of a *cul-de-sac* or dead end whereby petitioners, as well as the general traveling public, lost the right of ingress to the roadway leading east to Pittsburgh and the right of egress from Rosslyn Farms Borough to Bell Road via the use of Ramp A.

After the erection of the barricade the only means of access remaining to them was through that end of Bell Road that connects with Bell Avenue and the general system of streets to the south. Thereafter it, was still possible to reach Rosslyn Farms Borough and the Roadway East, but to attain to the degree of access petitioners had prior to the 1957 plan revision necessitated added circuity of travel. It now became necessary to proceed through the general system of streets in the Borough of Carnegie to the next interchange to reach the Roadway East, a distance of approximately one and one-tenths of a mile, that interchange being approximately one mile away and the first possible destination on entering the

Roadway East at the Rosslyn Farms Interchange. But whereas petitioners formerly proceeded to the next interchange on a limited access two lane roadway, they now must travel over local service township and borough roads.

There was testimony before the Board of Viewers that as a direct result of the plan revision of 1957 and the erection of this barricade, petitioner Babcock's property suffered a loss of over $100,000 in estimated value, and petitioner Red Jacket's property suffered a loss of approximately $12,000. These losses were attributed to the fact that prior to the construction of the barricade the properies, having immediate access to the Parkway East by way of Bell Road and Ramp A, had the enhanced character of being eminently suited for light commercial use. It is contended that they lost this character with the destruction of the barricade.

This is the damage of which petitioners complain. Relying largely on the Creasy v. Stevens case, 160 F. Supp. 404, reversed 79 S. Ct. 1034, 360 U. S. 219, 3 L. Ed. 2d 1186 (holding that an abutting landowner's existing right of access is a property right, the total deprivation of which amounts to a taking), they allege that the closing of Bell Road at its intersection with Ramp A constitutes a taking of their property right without compensation and hence is in violation of the Fifth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 10, and Article XVI, Section 8, of the Pennsylvania Constitution; and that (as Creasy v. Stevens held), since Section 8 of the Limited Highway Act of 1945, P. L. 1108, 36 P. S. 2391, authorizes this, it is patently unconstitutional.

It is Commonwealth's position that the 1957 plan revision was motivated by traffic safety and public welfare considerations, that petitioners never possessed an abutter's right of access directly from their properties onto Ramp A and the limited access Parkway, and that their right of access to and from Bell Road, a public road, has never been affected. The Commonwealth contends that the law in Pennsylvania is clear that, in the absence of a Constitutional or statutory provision, the closing of Bell Road at its intersection with Ramp A, as authorized by Section 4 of the Limited Access Highway Act of 1945, *supra*, gave the petitioners no right to damages since it occurred wholly within the right of way area quit-claimed to and acquired by the State in 1952.

Since the act complained of is the erection of the barricade as authorized by the plan revision of 1957, the court is not concerned with the effect of the construction of Ramp A and the Parkway on petitioners' properties pursuant to the condemnation of 1952, except in two respects:

First, whether or not an abutting landowner is vested with a right of access where the State constructs a limited access highway adjacent to his property.

Secondly, whether or not the highway plan that was expressly made a part of the Deed of Quitclaim and Release executed by George Peat in 1952 gave him a contract right to the access point at the intersection of Bell Road with Ramp A as shown on that plan.

The basic issue before the court is whether or not the "easement" of access is a property right for the deprivation of which the Commonwealth is liable in damages under Article I, Section 10 of its Constitution.

This is a situation in which the property owners abut both a limited access highway and a public road leading onto that highway. We must determine whether or not:

(a) the creation of a limited access highway vests an easement of access in the abutting landowners; and

(b) the creation of a *cul-de-sac* is a "taking" of property for which the Commonwealth must respond in damages.

HISTORICAL CONSTITUTIONAL DEVELOPMENT

In any determination of the constitutional limitations upon the power of eminent domain, a basic declaration of what constitutes a taking of property in its constitutional sense is essential.

The Constitution of Pennsylvania contains two such limiting provisions. Article I, Section 10, which is substantially identical to the Fifth Amendment to the Federal Constitution, provides:

> "* * * nor shall private property be *taken or applied* to public use, without authority of law and without just compensation being first made or secured"

Article XVI, Section 8 provides:

> "Municipal and other corporations and individuals * * * shall make just compensation for property *taken, injured or destroyed* by the construction or enlargement of their works, highways or improvements * * *" (Emphasis supplied).

Two distinctions must be noted. The first is that while Article I, Section 10 applies to both the Commonwealth and those to whom it delegates this power, Ar-

ticle XVI, Section 8 by its terms applies only to "municipal and other corporations and individuals". Thus it is inapplicable where the Commonwealth itself is the condemnor. Com. v. McGrady, 399 Pa. 586, 592, 160 A. 2d 715; Ewalt v. Penn Turnpike Commission, 382 Pa. 529, 115 A. 2d 729; Soldiers and Sailors Memorial Bridge, 308 Pa. 484, 162 A. 2d 309.

The second distinction concerns the precise meaning to be given to the wards "taken or applied" in contradistinction to the words "property taken, injured or destroyed". Eminent domain being a sovereign power vested in the Commonwealth and an inherent attribute of sovereignty (Jacobs v. Clearview Water Supply Co., 220 Pa. 388, 69 At. 870, 21 L. R. A. (N. S.) 410; Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305, 88 At. 487), it is logically apparent that the only limitations upon the free exercise of this paramount power to use property for the public benefit are those imposed either by the constitution or the legislature. Com. v. Plymouth Coal Co., 232 Pa. 141, 81 At. 148, affirmed 34 S. Ct. 359, 232 U. S. 531, 58 L. Ed. 713; Philadelphia Clay Co. v. York Clay Co., supra; Lazarus v. Morris, 212 Pa. 128, 61 At. 815.

Thus, in the absence of any statutory assumption of liability, the Commonwealth as condemnor is required to make compensation for property *taken,* but apparently is not under the same compulsion where property is *injured or destroyed.*

The concept of property in its constitutional sense has been undergoing a radical change in recent years. Though at common law the term denoted the legal significance of the rights of persons in relation to a tract

of land or a chattel, the meaning ascribed to the term at the time many of the eminent domain provisions were framed and adopted was synonymous to the subject matter itself. Instead of denoting the aggregation of the qualified rights of users, exclusion, enjoyment and disposition, the word "property" in the area of eminent domain embraced only the meaning often used in common parlance to denote the tract of land or chattel itself. (Sedgwick, Const. Law 2d ed. pp. 456-458; Lewis Eminent Domain, 3rd ed. §66(57).) Thus a "taking" in its constitutional sense meant a physical, tangible appropriation of the property of another.

In reference to this, the Supreme Court of the United States has said:

> "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizens, as those rights stood at the

> common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." Pumpelly v. Green Bay Co., 13 Wall. 166, 177, 1871.

Since 1871 a concept has gradually developed that any substantial interference, subversion, or obstruction of the essential attributes of ownership is a "taking" of property.

As *Corpus Juris* defines and as often cited with approval by our courts, a taking is "any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner * * *" 20 C. J. 566; Caplan's Appeal, 293 Pa. 483, 490; Miller v. Beaver Falls, 368 Pa. 189, 196, 82 A. 2d 34.

In holding that low and frequent flights of aircraft taking off from and landing at an airport substantially interfered with an owner's use and enjoyment of his land and constituted the "taking" of an air easement over the property, our Supreme Court has said in the case of Griggs v. Allegheny County, 402 Pa. 411, 414, reversed 82 S. Ct. 531, 369 U. S. 84, 7 L. Ed. 2d 585, a "taking" occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property. In U. S. v. Causby, 328 U. S. 256, a similar definition is given.

Wherefore we think it indisputable that, unlike former times, to constitute a "taking" there is no need today for an actual, physical seizure of land and that "whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree

abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto,* taken, and he is entitled to compensation." Miller v. Beaver Falls, supra.

ABUTTERS EASEMENT RIGHTS

The nature of an abutting owners' right of access is what is known in law as an "easement appurtenant". It not only enables the owner to enter and leave his premises by way of the public road, but also establishes the accessibility of his premises for his patrons, clients, and customers. 28 C. J. S. Easements, §§ 1-4; 25 Am. Jur., Highways, § 154; 39 C. J. S. Highways, § 141; Restatement, Servitudes, §§ 450, 453, 507; 10 McQuillin Municipal Corporations, 671 (3rd ed. 1950).

It arises as a private contract right where an owner of land subdivides it into lots and streets, and a purchaser relies on a plan showing his lot to be on a street. O'Donnell v. Pittsburgh, 234 Pa. 401; Chambersburg Shoe Mfg. Co. v. Cumberland Valley Railroad Co., 240 Pa. 519; McGarrity v. Commonwealth, 311 Pa. 436, 166 At. 895; Walsh v. Scranton, 23 Pa. Superior Ct. 276; Lang v. Smith, 113 Pa. Superior Ct. 559.

Aside from a private contract right, the real source of the right of access is generally conceded to have arisen by the judicial decisions in the so-called "elevated railway cases". Under the New York statutes establishing streets, it was held that a trust was created for the benefit of the public at large as well as for the owners of abutting property. The exclusion of the public and the diversion of the streets to private use violated the rights of the abutters and authorized them to recover

the property-value losses traceable to the breach of trust. Story v. New York Elevated R. R., 90 N. Y. 122; Lahr v. Metropolitan Elevated Ry., 104 N. Y. 268, 10 N. E. 528; Clarke, The Limited Access Highway, 27 Wash. L. R. and State Bar J. 111, 117; Freeways and the Rights of Abutting Owners, 3 Stanford L. R. 298; Cunningham, The Limited Access Highway From a Lawyer's Viewpoint; 13 Mo. L. R. 19, 31; 41 Yale L. J. 221.

Lewis, in his work, Eminent Domain, § 121 (91 f) (3rd ed. 1909), draws these access rights from an analogy with the private contract right cases.

In tracing the origin of the whole doctrine of abutter's rights, Mr. Justice Holmes commented in Muhlker v. New York & H. R. Co., 197 U. S. 544, 572, 25 S. Ct. 522, 528, 49 L. Ed. 872:

> "The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purpose of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York courts had decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantages of the expectation that a street would remain open and a right *in rem* that it would remain so * * * But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropria-

tion of the street to the uses of the public * * * it was possible for the New York courts to hold, as they seem to have held, that *the easement* which they had declared to exist *is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right,* as against what I have called the parasitic right which the plaintiff claims." (Emphasis supplied).

STATE COURTS DEFINE EASEMENT

The Supreme Court of the United States has declared that:

> "The same law which declares the easement defines, qualifies and limits them. Surely such question must be for the final determination of the State Court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement, or it may declare that he has an absolute and unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the States, * * * and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public policy." Sauer c. New York, 206 U. S. 536, 548, 27 S. Ct. 686.

Thus, while the Fifth Amendment of the United States Constitution applies to the states via its incorporation into the Fourteenth Amendment, (Penn Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322)

both are clearly inapplicable with regard to the question of abutters' rights. Sauer v. New York supra; U S. v. Powelson, 319 U. S. 266, 279; Reichelderfer v. Quinn, 287 U. S. 315, 319, 53 S. Ct. 177, 77 L. Ed. 331, 83 A. L. R. 1429; Meyer v. City of Richmond, 172 U. S. 82, 19 S. Ct. 106, 43 L. Ed. 374.

STATE HOLDINGS WIDELY DIVERGENT

An examination of the law in other states discloses a wide divergence on this subject. Persuasive precedents can be found on both sides and the decisions are totally irreconcilable. Even where the constitutional guarantees are identical in phraseology, namely, requiring compensation for property "taken", or "taken or applied", or "taken or damaged", or "taken or destroyed", or "taken or injured", the various jurisdictions have not agreed in the interpretation of these terms. For example, Massachusetts, New Hampshire and Tennessee all provide that property shall not be "taken or applied to public use without just compensation * * *" But whereas Massachusetts and New Hampshire have declared that access is not a property right, Tennessee allows recovery in such cases. Davis v. County Com'rs., 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; Cram v. City of Laconia, 71 N. H. 41, 51 A. 635, 57 L. R. A. 282; Illinois Cent. R. Co. v. Moriarity, 135 Tenn. 446, 186 S. W. 1053.

Numerically, the preponderance lies with those states holding that access is a property right within the constitutional guaranty of just compensation. Nearly all commentators concur in this conclusion. 29 C. J. S. Eminent Domain § 105; 18 Am. Jur. Eminent Domain § 158, 183; 49 A. L. R. 330; 93 A. L. R. 639; McQuillan,

Municipal Corporations, 2d Ed. vol. 4, §§ 1526-1527; Lewis, Eminent Domain, 3rd Ed., vol. 1 § 121; 16 Harv. L. R. 372; 39 Yale L. J. 128; 27 Wash. L. R. and State Bar J. 111; 3 Stanford L. R. 298. However, agreeing on this essential point, they differ considerably in fixing its precise nature and extent.

Petitioners rely on the cases of Breinig v. Allegheny County, 332 Pa. 474, Walsh v. Scranton, 23 Pa. Superior Ct. 276, Lang v. Smith, 113 Pa. Superior Ct. 559, and Stuart v. Gimbel Bros., 285 Pa. 102, for the proposition that access is a property right in Pennsylvania. They rely on the case of Creasy v. Stevens, supra, for the propositions that no physical appropriation of land is necessary to constitute a taking of private property and that *the total deprivation of an existing right of access* is a taking of property for which the Commonwealth must make just compensation.

We cannot agree with this conclusion.

The cases cited by the petitioners and by the case of Creasy v. Stevens were declarations of abutters' rights under Article XVI, Section 8 of the Pennsylvania Constitution and various statutory enactments expressly assuming liability where the condemnor is one other than the Commonwealth itself. While we concur both in the holding that there need no longer be a physical appropriation of land to constitute a taking of property, and that access is a property right by virtue of Article XVI, Section 8 and various legislative enactments applicable to "municipal and other corporations and individuals", we cannot agree that this amounts to a declaration that access is a compensable property right where the condemnor is the Commonwealth.

Only Article I, Section 10 of the Pennsylvania Constitution is applicable where the Commonwealth is the condemnor and the question is one of abutters' access rights.

Article I, Section 10 differs greatly from Article XVI, Section 8 in concept.

Where Article XVI, Section 8. guarantees a just compensation where property is "taken, injured, or destroyed", Article I, Section 10 guarantees a right to damages only where land is "taken or applied" to public use. Eminent domain being an inherent power of sovereignty, in the absence of legislative enactments the sole qualifications on the full exercise of that power are those imposed by the constitution itself. Thus, to say that access is a property right because Article XVI, Section 8 and various legislative enactments have *vested a* right of compensation in property owners where the condemnor is a municipal or other corporation or individual, is not a declaration that the same limitation is mposed where the Commonwealth is the condemnor.

As the Supreme Court of the United States has said:

> "Surely such question must be for the final determination of the State Court. It has authority to declare that the abutting landowner has no easement of any kind * * *, it may determine that he has a limited easement, or it may declare that he has an absolute and unqualified easement." Sauer v. New York, supra.

Therefore, in the absence of statute, petitioners must establish their right to compensation under Article I, Section 8 of the Pennsylvania Constitution or not at

all. Monongahela Navigation Co. v. Coons, 6 W. & S. 101; Sharpless v. Mayor of Philadelphia, 21 Pa. 147; Best v. Zoning Board of Adjustment of City of Pittsburgh, 393 Pa. 106, 141 A. 2d 606.

The courts of Pennsylvania have always held, prior to the Griggs v. Allegheny County case (supra) that Article I, Section 10 of its Constitution requires an actual appropriation of land to constitute a "taking" of property and that the Commonwealth, in the absence of any statutory assumption of liability, is not liable for damages in the absence of such "taking". State Highway Route No. 72, 265 Pa. 369, 375; Hoffer v. Reading Co., 287 Pa. 120, 124; Soldiers and Sailors Memorial Bridge, 308 Pa. 487, 491, 492; McGarrity v. Commonwealth, 311 Pa. 436, 438; Locust St. Subway Construction, 117 Pa. Superior Ct. 86, 90, 92, 93; Heid v. Allegheny County, 122 Pa. Superior Ct. 312, 315; Heil v. Allegheny County, 330 Pa. 449, 453; Brewer v. Commonwealth, 345 Pa. 144, 145; Koontz v. Commonwealth, 364 Pa. 145, 147; McCrady Case, 399 Pa. 586, 591.

It has been held that in the absence of a statute there is no liability for damages when a street or highway is vacated. Heil v. Allegheny County, supra, and cases cited therein. It has relegated all other injuries to the area of "*damnum obsque injuria*" or consequential damages for which there is no right to compensation. Soldiers and Sailors Memorial Bridge, supra. However, when land is taken for highways, the abutting owner retains the right of access as an incident to ownership of the remainder of his land. McCrady Case, supra, and cases cited therein.

The issue thus narrows itself to a determination whether the holding of the Griggs v. Allegheny County case that "a taking occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property" amounts to a declaration that henceforward access is to be a compensable property right in cases where the Commonwealth is the condemnor.

In view of the long line of cases cited above and the declaration of our Supreme Court that they are the well-established principles of law within this state, it is our opinion that it does not.

And if, in the absence of statute, access is not a property right where the Commonwealth is the condemnor, then it would be patently improper for a lower court within this jurisdiction to create a new right by the simple process of redefining its Constitution.

DISCUSSION OF CONTRACT RIGHT

The petitioners further contend that the highway plan showing the access point at the intersection of Bell Road and Ramp A, which was expressly made part of the deed of quit-claim and release executed by George Peat, created a contract right in the petitioners in the nature of a private easement of access.

As previously indicated, that plan disclosed not only how the land of the petitioners' predecessor in title would be directly taken and injured, but also how and to what extent the proposed improvements would affect that entire general area. It showed how the lands of other property owners would be taken and injured, and contained

numerous engineering details and specifications totally unrelated to Peat's land.

Common sense would indicate that there was no intent that the plan should confer on George Peat, a contract right to require the Commonwealth to take so much of his neighbor's land and no more, that within its right of way the Commonwealth may do nothing in the way of additions and improvements without his consent, and that, in effect, the Commonwealth be required to surrender its police power over that portion of the Parkway to his discretion.

The facts here are wholly unlike the situations out of which a private contract right of access is said to arise. The essential difference is one of intent.

Where one subdivides one's property into lots and plots streets thereon, one either intends that purchasers should rely on the plan showing their lots to be on a street or one intends to vest an express easement in those streets in the purchasers. In both cases the result is the same; the primary intent is to confer a private right upon each purchaser of a lot within that plan.

However, under the facts before the court, it is quite evident that the Commonwealth, in planning and constructing the access point between Bell Road and Ramp A, and the limited access highway, had only in mind its primary benefit to the entire traveling public.

It had no intent to confer a private contract right upon anyone. In fact, we may presume that there is an express reservation that should this access point prove detrimental to the general welfare and safety of the traveling public, the Commonwealth retains the police

power to control, modify or eliminate this access point. There being no intent to confer a private right of easement in any single landowner, it is the opinion of this Court that the mere fact that an access point at the intersection of Bell Road and Ramp A was plotted on the highway plan that was made part of the deed executed by George Peat, is insufficient to establish that a private contract right or easement was granted him in rerogation of the power of the Commonwealth to regulate its highways in the best interests of the general traveling public.

By the terms of this Deed of Quitclaim and Release, George Peat surrendered to the Commonwealth all claims arising from the 1950 condemnation whether it be the taking of the right of way for the proposed Parkway, the denial of access from the portions of his land abutting the limited access highway, the severance of the parts of Bell Road in Robinson Township from the portion lying in Rosslyn Farms Borough, the separation of Peat's property by the Parkway itself, or any other claim "for or on account of any taking, injury, or destruction of property, through or by reason of the improvement of the said road, * * * or through or by reason of the deprivation of the right of access, egress and ingress to and from the section of highway * * *."

The taking, injury, and destruction of property pursuant to the 1950 condemnation having been compensated for and no private contract right to the access point between Bell Road and Ramp A having accrued, the action of the Commonwealth pursuant to the 1957 plan revision constituted a separate and distinct occurrence unrelated to the 1950 condemnation.

Since the erection of the barricade within the right of way lines acquired by the Commonwealth falls in the category of consequential damages, as defined in Soldiers and Sailors Memorial Bridge, supra, the Court is constrained to hold that there has been no "taking" of property within the meaning of Article I, Section 10 of the Pennsylvania Constitution as a matter of law.

But assuming that some measure of access is necessary for the beneficial use and enjoyment of property, assuming that the holding of the Griggs v. Allegheny County case, supra, amounted to a declaration by our Supreme Court that henceforth access is to be a compensable property right within the meaning of Article I, Section 10 of its Constitution, and assuming that petitioners have not released to the Commonwealth the claims arising from the 1950 condemnation, then this Court must determine whether or not a right of access accrues to an abutting property owner where the Commonwealth creates a limited access highway, and whether or not a right to just compensation accrues where the Commonwealth has created a *cul-de-sac* or dead-end.

The facts and issues before the Court are not those presented in the case of Creasy v. Stevens, supra. In that case there was the *total* destruction of an *existing* right of access by the conversion of an existing highway into one of limited access. In this case, the portions of the limited access highway upon which petitioners abut were newly located and constructed and the creation of a *cul-de-sac* by terminating a street at its intersection with a limited access highway is not a *total* deprivation of access.

Transportation is a basic need of mankind. It is a fundamental ingredient in the spread of civilization, the growth of commerce, and the acquisition of livelihoods. But with each socio-economic advance has come more and more traffic congestion and mounting personal injuries, death tolls, and billions in property loss. Our highway systems become increasingly inadequate with each passing year in spite of the billions of dollars annually spent for the construction and maintenance of public roads. The presence of unlimited entrances to the highway, the parking, the commercial use of roadsides, and the frequent ingressing and egressing from the traffic stream, all conspire to promote congestion and peril for the traveler.

The high cost of highway facilities has already seriously impeded their construction. Thus the determination of the precise extent of an abutter's right of access should be the result of a weighing of the relative interests of the public and the individual, so as to arrive at a just balance. Neither should the function of the government to act for the public good be unduly restricted, nor should the constitutional policy of insuring the individual against an unreasonable loss, occasioned by the exercise of governmental power, be violated.

The factors that should be considered are, on the one hand, the magnitude of the damage to the owner of land, and, on the other, the desirability and necessity for the particular type of improvement and the danger that the granting of compensation will tend to retard or prevent it. Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321;

Bacich v. Board of Control of California, 23 Cal. 2d 343, 144 P. 2d 818; 34 Columb. L. R. 938; 42 Columb. L. R. 596.

As previously indicated, the Supreme Court of the United States has repeatedly declared that the recognition and definition of interests within the term "private property" are essentially matters for each state to determine. Meyer v. City of Richmond, supra; Sauer v. New York, supra; Reicheldfer v. Quinn, supra; U. S. v. Powelson, supra.

If an abutter is given a right of access at every point at which his property abuts, namely an absolute right of access, then every degree of "injury", whether it be the vacation of streets, the creation of separate traffic lanes, the prohibition of U-turns, the designation of one way streets or any of the other numerous regulations usually imposed, become in some measure compensable.

The result is the destruction of the distinction between Article XVI, Section 8 and Article I, Section 10, and the difference between the concept of the "taking" of property and the "injury and destruction" of property will have ceased to have any meaning. The cost of improvements will clearly become prohibitive.

If a total denial of access is non-compensable where the Commonwealth is the condemnor, then theoretically the Commonwealth can, by the erection of high barriers around the entire circumference of one's property, totally deny a property owner of the beneficial use and enjoyment of his property without liability.

The third alternative implements the concept that some measure of access is necessary for the beneficial use and enjoyment of property, and that the total destruction of existing access constitutes a "taking" of property.

The right is one of adequate and reasonable access which, when it becomes vested from use, becomes a property right. There then need be no fear that individual rights will be unduly subordinated to the rights of society, for each claimed exercise of governmental power is subject to judicial examination.

The limitation and regulation of highway traffic comes under the police power (25 Am. Jur., Highways § 253; 40 C. J. S. Highways § 232), and highways exist primarily for the benefit of public travel. But the exercise of this primary right, without just compensation, should not be in derogation of the fundamental and traditional attributes of property. Thus the use of streets and highways may be limited, controlled, and regulated by public authority in the exercise of the police power whenever and to the extent necessary to provide for and promote the public safety, peace, health, and the general welfare of the people, but never to the degree that all existing rights of access are destroyed.

Some courts have attempted to solve the *cul-de-sac* problem by declaring that only those property owners abutting the block on which the obstruction or vacation occurs are entitled to damages. This seems to us unrealistic, since property on the same street in the next block may likewise be diminished in value as a result of the improvement and the owners may be similarly inconvenienced by circuity of travel.

Recovery should not depend upon the accident of location. If an injury different in kind from that suffered by the general traveling public is required as the prerequiste to a right of recovery, then a destruction of access amounting to a taking of the beneficial use and enjoyment of property should be required. The rule should be that the right of ingress and egress consists of an adequate and reasonable access from the property to the street, that it does not extend to the full width or the full length of the sreet, or even to all points upon the street in front of the abutting property. It is sufficient if there is access to a street that in turn connects with the general street system. Any omprovement that does not materially interfere with such access does no compensable damage.

We are fully aware of the decisions that have held the depreciation of property in value to be the criteria of compensable damage but *they have never been applicable where the Commonwealth has been the condemnor.*

If that criteria is to be adopted, then justice dictates that the right of recovery should not be limited to those abutting the block on which the obstruction or vacation occurs. (See cases collected in 49 A. L. R. 330; 92 A. L. R. 639; McQuillin, Municipal Corporations, 2d ed., Vol. 4 § 1425 *et seq.*) Furthermore, diminution in value as a criteria for a special injury has been forcefully repudiated by Mr. Chief Justice Stone in the case of Reichelderfer v. Quinn, supra.

The rule of adequate and reasonable access is fully and logically consonant with the unanimous opinion throughout the country that the inconvenience oc-

casioned by a necessary circuity of travel, *in the absence of arbitrary action,* is one shared in common with the general public and noncompensable. It is in full accord with the philosophy enunciated in the case of Breinig v. Allegheny County, supra.

Under this rule, the injury suffered by the petitioners is noncompensable. The *cul-de-sac* created by the termination of Bell Road at its intersection with Ramp A, as authorized by the 1957 plan revision, in no way denied them access to the general system of streets. Uncontradicted testimony before the Board of Viewers discloses that to attain to the degree of access petitioners had had previously merely entailed, with small circuity of travel, the use of existing township and borough roads instead of a limited access ramp and two-lane limited access roadway.

The limited access highway is the culmination of a search for a type of facility that would provide for the safe, efficient, economical, and expeditious movement of traffic without the attendant hazards of conventional, general service highways. The wide and proven benefits derived from their presence make them eminently desirable in terms of traffic congestion, delays, and motor vehicle accidents.

All the authorities are in agreement that where an entirely new limited access highway is located and constructed, there is no duty to compensate an abutting landowner for the loss of a right of access which he never had. Clarke, The Limited Access Highway, *supra;* Cunningham, The Limited Access Highway From a Lawyer's View point, *supra;* Freeways and the Rights of Abutting Owners, *supra.* These three articles have con-

sistently been quoted as being the authorities on this subject (Citations omitted).

CONCLUSIONS

It is therefore the opinion of this Court that:

1. While the physical appropriation of land is no longer necessary to constitute a "taking" of property, access is as yet a compensable property right within the meaning of Article I, Section 10 of the Pennsylvania Constitution.

2. The Fifth and Fourteenth amendments of the United States Constitution and Article XVI, Section 8 of the Pennsylvania Constitution are inapplicable where the issue is one of access rights and the Commonwealth is the condemnor.

3. The creation of a new limited access highway vests no right of access in the abutting owners.

4. The Deed of Quitclaim and Release executed by George Peat, petitioners' predecessor in title, released the Commonwealth from all claims arising out of the 1950 condemnation.

5. The highway plan that was expressly made a part of that deed created no contract right in the nature of a private easement to the access point at the intersection of Bell Road with Ramp A.

6. The barricade at that intersection pursuant to the 1957 plan revision as approved by the Governor and authorized by Section 4 of the Limited Access Highway Act of 1945, P. L. 1108, did not constitute a "taking" of

property within the meaning of Article I, Section 10 of the Pennsylvania Constitution.

7. If access is a property right within the meaning of Article I, Section 10, it is only a right to an adequate and reasonable access, which has not been denied the petitioners.

8. If access is a property right within the meaning of Article I, Section 10, the creation of a *cul-de-sac* is not a compensable injury where the property owner still retains access to the general system of streets and the condemnor is the Commonwealth.

9. In the absence of an act of the legislature expressly assuming liability, there has been no "taking" of property as a matter of law.

Wherefore, the exceptions to the Reports of the Board of Viewers were dismissed and the Reports of the Board of Viewers confirmed.

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IN THE
Supreme Court of the United States

October Term, 1965

No. 481

BABCOCK BOULEVARD LAND COMPANY and RED JACKET, INC.,
Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA

On Petitions for Writs of Certiorari to and Appeals from the Supreme Court of Pennsylvania.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO AND APPEALS FROM THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

Does the creation of a cul-de-sac constitute the condemnation of a property right of an abutting land owner when the land owner has not been deprived of access to his property?

Negatived by the Court below.

Respondent is satisfied with Petitioners' statement of question No. 2.

COUNTER-STATEMENT OF THE CASE

These cases are before your Honorable Court on appeal from and Petitions for Writ of Certiorari to the Supreme Court of Pennsylvania, which affirmed per curiam an order of the Court of Quarter Sessions of Allegheny County, Pennsylvania, dismissing Petitioners' (Plaintiffs below) exceptions to the awards of Boards of Viewers which had not awarded Petitioners any damages in an eminent domain action instituted by them.

The Petitioners are owners of contiguous tracts of land, situate in Robinson Township, Allegheny County, Pennsylvania. Both tracts front on Pennsylvania Legislative Route 765, Section 3-A, a limited access highway, known locally as Parkway West, hereinafter referred to as Parkway. The entire tract was formerly owned by an individual named George Peat. Prior to June 2, 1950, the Parkway did not exist. On June 2, 1950, the Commonwealth of Pennsylvania, acting through the Department of Highways, condemned a portion of the land of George Peat for purposes of constructing the limited access Parkway. By virtue of this condemnation, George Peat acquired a claim for damages against the Commonwealth. On June 23, 1952, George Peat settled his claim and executed an instrument entitled "Deed of Release and Quitclaim, Limited Access Highway." The release states, inter alia, that Peat releases "the Commonwealth or any agency or political sub-division thereof for or on

account of any taking, injury or destruction of property through or by reason of the improvement of the said road . . . or through or by reason of the deprivation of the right of access, egress and ingress to and from the section of highway, or through or by reason of the subsequent maintenance thereof according to the standards of the Department of Highways. A plan showing the proposed improvement is hereto attached and made part of this release". This plan and release has been made part of the Petition for Writ of Certiorari, and is marked Petitioners' Exhibit Number 1A.

On December 19, 1962, George Peat conveyed the entire tract to Babcock Boulevard Land Company, hereinafter referred to as Babcock, which in turn conveyed that portion now owned by Petitioner, Red Jacket Company, Inc., hereinafter referred to as Red Jacket, to Red Jacket.

The Babcock tract remains unimproved. Red Jacket has erected on its tract a one-story light-industrial building, wherein it conducts its business.

The tracts owned by both Petitioners front on Bell Road, a township road. Both tracts have unimpeded access to Bell Road. The access from Petitioners' property to Bell Road is today the same as it has always been. Petitioners still have access to the general system of streets. *There has been absolutely no diminution of Petitioners' rights as abutters on Bell Road.* Bell Road runs generally south to north through the tracts of the Petitioners. Immediately abutting a portion of the property of Babcock on the north is ramp "A". Ramp "A" is a one-way, limited

access ramp, via which traffic was previously able to enter the eastbound lane of the Parkway. Ramp "A" would be utilized by traffic originating in an area north of the westbound lane of the Parkway or, in the alternative, by traffic moving westward on the Parkway and which turned off of the westbound lane for the purpose, in effect, of turning around and driving eastwardly.

No portion of the property of Red Jacket abuts Ramp "A".

Bell Road in the course of its northward projection intersected Ramp "A". By virtue of the condemnation of June 2, 1950, it was legally permissible to turn right off of Ramp "A" into Bell Road. Traffic was not permitted to turn right from Bell Road onto Ramp "A". Thus, Ramp "A" was not limited access at the point at which a right turn off of Ramp "A" was permitted. All other portions of Ramp "A" were limited access. *Contrary to the assertion in their Petition, neither Petitioner Babcock nor Red Jacket ever had the legal right to drive from their respective tracts onto the parkway. In order to reach Petitioners' properties from the Parkway, it was necessary to turn right off of Ramp "A" onto Bell Road, and then traverse Bell Road to a point of entrance to Petitioners' tract.* Petitioners could drive from their property onto Bell Road. It was never legally possible to drive from Bell Road onto Ramp "A", and then onto the Parkway.

On October 9, 1957, in accordance with a plan duly signed by the Governor of the Commonwealth of Pennsylvania, the Commonwealth acting through the

Department of Highways, erected a barricade at the point of intersection of Bell Road and Ramp "A". The effect of this barricade was to convert Bell Road into a cul-de-sac. After the creation of the cul-de-sac, it was no longer possible to make a right turn off of Ramp "A" onto Bell Road. Petitioners' rights of access to Bell Road and Petitioners' rights as abutters on Bell Road have never been disturbed.

No portion of any land of either Petitioner was condemned by the Commonwealth of Pennsylvania.

Petitioners' basic contention, precisely stated, is that converting the road on which they abut into a cul-de-sac constitutes a taking of property from them, for which taking they are entitled to compensation.

The basic contention of the Commonwealth, concisely stated, is that the creation of a cul-de-sac is an act done within the police power of the state and does not constitute taking of a property right so as to entitle abutters to compensation.

REASONS FOR DENYING WRITS AND DISMISSING APPEALS

The Petitions for Writ of Certiorari Should Be Denied and Appeals Dismissed Because No Substantial Federal Question Exists and Prior Decisions of This Court, on Related Questions, Indicate That This Court Will Leave to State Courts the Determination of Such Issues as Have Been Raised by Petitioners

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Respondent respectfully states that the petitioners have not raised any question which has not, in effect, been previously decided by this Court. This Court should decline to review the judgments of state courts when those judgments and decisions are predicated upon reasonable and adequate bases and interpretations of state law. *Fay v. Noia,* 372 U. S. 391, 9 L. Ed. 2d 837 (1963).

This case when stripped of all embellishments amounts to no more than a cul-de-sac case. Petitioners' properties abut Bell Road. Prior to the erection of the barricade of which petitioners complain, access could be had on to Bell Road from the Parkway. Bell Road was converted into a cul-de-sac at its point of intersection with the Parkway. Thus, the petitioners are asking this Court to determine the rights of abutting property owners, under Pennsylvania law, in the streets on which they abut. Determinations of

such questions have traditionally been left to state courts. *Sauer v. City of New York,* 206 U. S. 536, 51 L. Ed. 1176 (1906); *Marchant v. Pennsylvania Railroad Company,* 153 U. S. 380, 38 L. Ed. 751 (1894); *Meyer v. Richmond,* 172 U. S. 82, 43 L. Ed. 374 (1898).

Marchant, supra, is on its facts virtually determinative of this case. In *Marchant* a portion of the street on which the plaintiff's property abutted was condemned by the railroad company for construction of an elevated railroad. The pillars supporting the elevated roadway were imbedded in the foundation of the street, however, they were not in front of the plaintiff's property. No portion of the plaintiff's land was taken or occupied in any way by the railroad. An action was instituted to recover for damages caused by smoke, dust, and noise created by the operation of the railroad. At the trial, the Court of Common Pleas instructed the jury that the damages were compensable. The Supreme Court of Pennsylvania reversing, ruled that the damages were noncompensable. This Court indicated that it would not interfere with the state court's determination of questions of state law. It was said at page 385:

> "We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that State, and if this record presented no other question except errors alleged to have been committed by that Court in its construction of domestic laws, we should be obliged to hold, as has been often held in like cases (emphasis added) that we have

no jurisdiction to review the judgment of the State Court, and we should have to dismiss this writ of error for that reason."

In *Sauer*, supra, the city of New York had built a viaduct on 158th Street which had the effect of disturbing plaintiff's access, light, and air. The plaintiff alleged that the statute which authorized construction of the viaduct was invalid for failure to provide compensation for the rights of which plaintiff claimed to have been deprived. The statute had been upheld by the New York Court of Appeals. This Court affirmed that decision. The plaintiff alleged, inter alia, that the decision of the New York Court of Appeals denied him rights secured by the Federal Constitution. This Court said at page 548:

> "The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the State Court (Emphasis added.) It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; or it may determine that he has an absolute or unqualified easement. The right of an owner of land abutting on public highways has been a fruitful source of litigation in the courts of all the states, and the decisions have been conflicting, and often in the same state irreconcilable in principle. The Courts have modified or overruled their own decisions, and each state has in the end fixed and limited, by legislation or judicial decision, the rights of abutting owners in accordance with its own view of the law and public

> policy. As has already been pointed out, this court has neither the right nor the duty to reconcile these conflicting decisions, nor to reduce the law of the various states to a uniform rule which it shall announce and impose." (Emphasis added.)

It seems clear, and rightly so, that this Court will not take upon itself the burden of determining routine questions of property law in the several states. This presumes that no constitutional issues of monumental magnitude are presented. However, as indicated by Rule 19 (a), Rules of this Court, review on writ of certiorari should not be granted if the federal question presented is neither one of substance nor one decided contrary to applicable decisions of this Court. It is respectfully submitted that the question raised by petitioners is not only not a federal question of any substance, but was decided below squarely in line with the holdings in *Marchant* and *Sauer*.

In *Meyer v. Richmond,* 172 U. S. 82, 43 L. Ed. 374 (1898), the City of Richmond had authorized the Richmond and Allegheny Railway Company to construct a portion of its works in such a way as to obstruct the street on which plaintiff's property abutted. The Supreme Court of Appeals of Virginia had denied the plaintiff recovery of any damages. This Court affirmed. At page 95 it was said:

> If under the constitution and laws of Virginia whatever detriment he suffered was *damnum absque injuria* he cannot be said to have been deprived of any property.
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> *Marchant v. Pa. R.R.,* 153 U. S. 380.

The Court in *Meyer* went on to say, also at page 95:

> The substantial thing is not that one may be damaged by an obstruction in a street—not that one may be specially damaged beyond others, but is such damage or deprivation of property within the meaning of the constitutional provision? . . . Decisions in other states we need not resort to or review. Those of this court furnish a sufficient guide. (Emphasis added.)

Subsequent to the latter quote, the Court proceeded to discuss the cases of *Transportation Company v. Chicago*, 99 U. S. 635 (1878), *Chicago v. Taylor*, 125 U. S. 161 (1888), and *Gibson v. United States*, 166 U. S. 269 (1897). The injuries for which damages were sought in these cases were the result of consequential damages incurred during construction, but which ceased subsequent to construction. This Court made clear in each of these cases that the compensability of such damages was to be determined by the state courts and the disallowance of damages by the State tribunals did not constitute any affront to basic rights protected by the federal constitution. However, Respondent recognizes a difference in quality and degree between damages suffered during construction and the damage resulting from a permanent change in the street system which surrounds a property owner's land. These cases are cited by Respondent to emphasize the principle of non-interference in matters of state domestic law by this Court.

There is much language in the instant Petitions to the effect that the Petitioners have been deprived of

a property right without due process of law; thus contrary to the express provisions of the fifth and fourteenth amendments to the United States Constitution. It has already been shown that the domestic law of the State governs questions such as are raised here and the law of Pennsylvania relative to cul-de-sacs will be discussed in the next succeeding section of this brief. However, a comment on the allegation that Petitioners have been deprived of due process of law seems in order at this point.

The critical factor in determining if due process has been accorded complainant is whether a fair trial or hearing, governed by procedures fair, reasonable and adequate under all of the circumstances are available to the complainant. In this case there is no doubt but that such hearing and procedures were not only available but utilized by petitioners. The only matter about which petitioners can truly complain is that the law of Pennsylvania is unsatisfactory to them as applied to them. The Petitioners have been before a Board of Viewers, have taken exceptions in the Court of Quarter Sessions to the Award of said Board, have filed an appeal from the Award of the Board to the Court of Common Pleas, demanding a jury trial for which the law provides,[1] have argued the exceptions to the Award of the Board of Viewers in the Quarter Sessions Court, and have appealed the dismissal of the exceptions to the Supreme Court of

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[1] The proceedings in the Court of Common Pleas have been stayed pending outcome of these Petitions for Writ of Certiorari. Of course, no trials will be had if this Court affirms the Order of the Supreme Court of Pa.

Pennsylvania. All of these tribunals have ruled that the damages sought by petitioners are non-compensable. There is nothing unique about the damages allegedly suffered by petitioners. The statute and decisions of which Petitioners complain probably affect all members of the public at one time or another. The comment of this Court in *Marchant* at page 386 appears applicable to this situation. The Court said as follows:

> The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like conditions.

On this question the Court also said the following at pages 385-386:

> It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of her property, the proceedings that so resulted were in "due process of law".

In summary, it is respectfully submitted that no substantial federal question has been raised by petitioners and that the questions raised have been decided in accordance with applicable decisions of Your Honorable Court, and the Petitions for Writ of Certiorari should therefore be denied and the appeals dismissed.

In Pennsylvania, the Creation of a Cul-De-Sac Does Not Constitute the Taking of a Property Right From Abutters so as To Entitle Abutters to Compensation

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Initially, it must be noted that a cul-de-sac can be created by two means: (1) The erection of a barricade as in the case at bar, and (2) the vacation of a portion of the street. In discussing this aspect of the law, courts and text writers have a tendency to use the terms *cul-de-sac* and *vacation* interchangeably. Because the resulting factual situations are generally the same, respondent will refer, without distinction, to language utilizing both terms.

It has been settled law in Pennsylvania since the early case of *Paul v. Carver,* 24 Pa. 207 (1855), that vacation of a portion of a public road is not an injury for which abutting property owners are entitled to compensation. In *Paul v. Carver,* the owner of land had directed, in his will devising it, that a street be laid out through it either by his heirs or the appropriate public officials. The street was laid out by public officials, but was vacated subsequently by an act of the legislature. The owners of adjoining lots claimed a right to occupy and build upon the vacated area and the plaintiff asserted that this constituted an injury to him because his property could no longer be conveniently reached. Plaintiff was an abutting owner on the street. The strong and clear language of the Court is virtually determinative of the issues in the case at bar. The Court said at page 211:

> To open new highways, whether streets or country roads, and to vacate those which are

> useless, inconvenient, and burdensome, is a power which must reside somewhere in every well regulated government. In our own we have many laws conferring this authority on courts, on county and township officers, on city and borough councils, and on special commissioners. In very many cases, also, the General Assembly has, by its own direct and immediate act, ordered that streets and roads should be vacated, as well as opened, widened, and otherwise altered. Do all these laws violate the constitution? We cannot find anything in that instrument with which they are in conflict. Surrendering the right of way over a public road to the owners of the soil, is *not* taking private property for public use, and the proprietors of other land incidentally injured by the discontinuance of the road are not entitled to compensation . . . But a public road belongs to nobody but the state; and when the government sees proper to vacate it, the consequential loss, if there be any, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place.

It is difficult to conceive of any restriction or change in a general system of roads and streets, or changes in the regulation of traffic which do not impose, to at least a small extent, upon certain members of the public, some burden or inconvenience which they were not previously required to sustain. Since early in the common law, courts have recognized the necessity of the vast majority of these "injuries" being ruled noncompensable. Such regulations and

changes might include the erection of stop signs, traffic signals, no-turn signs, or, perhaps, conversion of a three-lane highway to a two-lane highway. It is clearly within the police power of the state to enact such changes and regulations. So it is within the police power to determine that it is for the public safety and benefit that a road be terminated at a given point. A property owner does not have a vested right, of which he cannot be deprived, without compensation, to be able to reach a given street or highway within the general system of streets and highways, by a particular route. This, in effect, is the right of which petitioners claim to have been deprived. Nowhere in the petitions for writ of certiorari, do petitioners allege that they have lost access to Bell Road. The allegation actually is that it is no longer possible to reach the parkway via Bell Road. Respondent readily concedes that it is often convenient and financially remunerative to be able to reach a high-speed limited access highway via a short trip from one's property. But, it is emphasized that no property owner possesses a vested right to such a convenience.

In *McGee's Appeal,* 114 Pa. 470 (1886), the plaintiff was the owner of a lot on a street which was a thru street as the result of a bridge which formed a part of the street. The Pennsylvania Railroad Company under contract with the City of Pittsburgh proposed to remove this bridge. In accordance with an act of the legislature, the railroad company had contracted with the city that the city would vacate certain public right-of-way if the railroad would first

acquire the properties abutting the right-of-way to be vacated. The plaintiff's property was not one which the railroad was to acquire. The plaintiff filed a bill seeking an injunction to restrain the City of Pittsburgh and the railroad company from removing the bridge which formed part of the street upon which plaintiff's property abutted. The lower court had sustained a demurrer to the bill in equity. The Supreme Court affirmed the decree and said at page 476:

> "In the absence of any constitutional restriction the power of the legislature to vacate streets and highways, or to invest municipal corporations with this power, cannot be doubted: Dillon on Mun. Corp., 666. In Pennsylvania, a highway is the property of the people, not of a particular district, but of the whole state; who, constituting as they do the legitimate sovereign, may dispose of it by their representatives and at their pleasure: Phila. Trent. R.R. Co.'s, 6 Wh. 25. Prior to the adoption of the present constitution, there was certainly no restriction of the powers of the legislature, in this respect; the legislature had a clear right to vacate any public highway, with or without the consent of the person whose private interests are or may be affected by it."

It cannot be too strongly emphasized that petitioners are in virtually the same factual situations as were the plaintiffs in *Paul v. Carver* and *McGee's Appeal,* supra, petitioners and the latter plaintiffs retained the right of ingress and egress to and from

their properties. Upon leaving their properties, they could turn and move in either direction.

Petitioners make much of *McCrady Case,* 399 Pa. 586, 160 A. 2d 715 (1960).

The Commonwealth had in addition to taking a portion of the plaintiff's land, erected within the right-of-way previously acquired by the Commonwealth, a curb which had the effect of so restricting ingress and egress to and from the subject property as to render it virtually useless for the purpose for which it was being utilized. The property was being utilized as a gasoline service station, restaurant and parking area. The Commonwealth contended that the installation of the curbing was an act done within the police power of the state and was therefore not a factor to be considered in evaluating the damages sustained by the landowner. The Supreme Court rejected the Commonwealth's contention and held that the installation of the curbing was part and parcel of the taking. Thus, the installation of curbing was an act done under the power of eminent domain and therefore compensable. The facts in McCrady are easily differentiated from those in the cases at bar. The McCrady property was, for practical purposes, deprived of any access. *Petitioners, it must be repeated again, have the same access, ingress and egress which they have always had.*

However, certain statements of the Court in *McCrady* are applicable here. The Court said at page 591:

> "In the determination of this issue certain well established principles of law must be kept in

mind. *First,* as stated by Mr. Justice (now Chief Justice) Jones in Koontz vs. Commonwealth, 364 Pa. 145, 147, 70 A. 2d 308: 'It is, of course, not open to dispute that, before the Commonwealth can be made to answer, in the present state of the statute law (Sec. 304 of the State Highway Law of June 1, 1945, P. L. 1242), for damages in cases of highway improvement, there must have been a taking of the complaining property owner's land.''

It was further said at page 592:

"*Second,* in the absence of any statutory provision providing therefor, the Commonwealth is not liable for consequential damages[3] incurred in the construction of highway [citing cases].

Third, unlike municipal and other corporations having the power of eminent domain, the Commonwealth is not within the provisions of Article XVI, Section 8, of the Pennsylvania Constitution."

Contrary to the implication on pages 19-21 of Petitioners' Petition, the Commonwealth is not in any way attempting to accomplish indirectly under the guise of police power that which it cannot do directly. The Commonwealth has not, in any way, shape or

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[3] "'Consequential damages' as defined by Mr. Justice (later Chief Justice) Kephart in Soldiers and Sailors Memorial Bridge, 308 Pa. 487, 490, 162 A. 309, are those which 'arise when property is not actually taken or entered but an injury to it occurs as the natural result of an act lawfully done by another'."

form, exercised the power of eminent domain so as to take petitioners' property. In the same vein, the strong language quoted by petitioners on page 21 of their petition, from *Key Realty Company Zoning Case,* 408 Pa. 98, 182 A. 2d 187 (1961), has absolutely no application to the instant cases. The *Key Realty* case was a zoning case in which a building permit to erect an apartment building on a given parcel was refused. The language quoted is from the concurring opinion of Chief Justice Bell, and has no legal connection or application whatsoever to the present cases.

The doctrine of *Paul vs. Carver* and *McGee's Appeal* was affirmed in Pennsylvania by *In re Melon Street,* 182 Pa. 397, 38 A. 482 (1897). The street on which the plaintiff's property abutted was converted into a cul-de-sac. The plaintiff's property did not abut the vacated area. The condemnation was by the City of Philadelphia and a right to recover damages caused by the vacation of a street in Philadelphia was conferred by statute. However, the Court said at pages 401-402:

> "'Before the adoption of the new Constitution the Commonwealth was under no obligation to make compensation for damages caused by the vacation of streets: Paul vs. Carver, 24 Pa. 207. And for the purpose of this argument it may be conceded that since its adoption no such duty is imposed by the provision that compensation shall be made for property taken, injured or destroyed, and that the right to recover damages for injury so resulting exists only by virtue of special legislative provision: McGee's Appeal, 114 Pa. 470."

The case of *Moyer et ux. vs. Commonwealth,* 183 Pa. Superior 322, 132 A. 2d 902 (1957), is especially pertinent to the immediate issue. In *Moyer* the highway on which plaintiff's property abutted was relocated. "It [highway] was moved away from appellant's lot some 30 feet, and a fill varying from nine to fifteen feet was made. No land was taken. Access to appellant's property was accomplished by filling in a portion of the old highway and making a steeply declining approach from an intersecting street which approach ends in a cul-de-sac." *Moyer,* page 335. The Board of Viewers awarded the plaintiffs no damages because no land was taken from them. An appeal to the Court of Common Pleas was filed and this appeal was dismissed on motion of the Commonwealth. The Superior Court affirmed dismissal of the appeal. The plaintiff argued that even though no land was taken from them, they lost a property right as a result of the deprivation of their ingress and egress and the placing of a fill in front of their property. The Court said at page 336:

> Eminent Domain is an inherent attribute of sovereignty. However, the Constitution of the Commonwealth contains two provisions restricting the use of that power, namely, Article I, Section 10, and Article XVI, Section 8. It is important to note that Article XVI, Section 8, applies to municipal corporations, but not to the Commonwealth, whereas Article I, Section 10, is a limitation upon both. Article I, Section 10, requires compensation only for property "taken or applied to public use", whereas Article XVI,

Section 8, requires compensation "for property taken, injured or destroyed".

Thus, consequential damages do not constitute a condemnation of a property right under Article I, Section 10, of the Pennsylvania Constitution and Pennsylvania law clearly imposes no duty upon the Commonwealth to pay compensation for consequential damages. It could well be argued that the creation of a cul-de-sac is, in most instances, less burdensome than many other types of consequential damage. In the present cases the cul-de-sac was created by the erection of a barricade. Thus no property of any property owner was taken by the Commonwealth. The Petitioners have not been burdened with any increase in noise, dust, or smoke. No physical change of any sort has been made in the roadway upon which plaintiffs abut; i. e., for example, there has been no change of grade.

As can be seen, the Pennsylvania cases holding that the creation of a cul-de-sac or vacation of a road is not the taking of a property right for which compensation must be paid, are legion, and it is respectfully submitted that for this additional reason the Petitions for Writ of Certiorari should be denied and the appeals dismissed.

No Contract Existed Between the Commonwealth and Petitioners Whereby Petitioners Were Invested With the Right To Have Bell Road Remain Open at Either of Its Two Terminal Points

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On page 14 of the Petition, Petitioners refer to a statement made by the Court of Quarter Sessions (R. 127a) in the course of its opinion. The complete paragraph is as follows:

> "Common sense would indicate that there was no intent that the plan should confer on George Peat a contract right to require the Commonwealth to take so much of his neighbor's land and no more, that within its right-of-way the Commonwealth may do nothing in the way of additions and improvements without his consent, and that, in effect, the Commonwealth be required to surrender its police power over that portion of the Parkway to his discretion."

On page 15 of their Petition, Petitioners refer to the case of *Cincinnati v. Louisville R. R. Co.*, 223 U. S. 390, wherein this Court recognizes that Article I, Section 10, Clause 1,[1] of the Federal Constitution is not a limitation upon the power of eminent domain. That case holds, in effect, that a contract may be appropriated to a public use so long as compensation is made therefor.

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[1] Article I, Section 10, Clause 1, United States Constitution, states, inter alia, as follows: "No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The Respondent has no quarrel with the proposition that a contract may be appropriated and compensation made therefor under the power of eminent domain, but, even assuming, arguendo, that a contract could exist under these circumstances, petitioners fail to recognize that a contract, as any other species of property, is subject to the exercise of police power by the state, with its attendant inconveniences and noncompensable burdens. However, it is unnecessary to reach into the academic stratosphere in order to dispose of petitioners' contention. It has been held in Pennsylvania that the Commonwealth cannot divest itself of its police power. *The Pittsburgh & Connellsville R. R. Co. v. Southwest Pennsylvania Railway Co.*, 77 Pa. 173 (1874). In the latter case, the factual situation was that the appellee railroad contended that it had the right to construct and operate its railroad across the roadway and tracks of the appellant railroad. Appellant contended that the act of the legislature creating it prevented the legislature from permitting any other railroad to utilize the locations chosen by appellant. The Court said at page 186:

> Besides, we cannot presume the legislature ever intended to divest itself of the exercise of the police power of the state. The right to regulate railroad crossings naturally flows from that reserve power.

Your Honorable Court's attention is also respectfully referred to the case of *Titusville Amusement Co. v. Titusville Iron Works Co.*, 286 Pa. 561, 134 A. 481 (1926). The city of Titusville passed an ordinance

which "for the public good and benefit of the said city" vacated and closed as a public street a portion of a street in the city. Defendant, which owned property on both sides of the vacated area, desired to take possession thereof and erect a building upon it. Plaintiff, an abutter on the street, filed a bill in equity seeking to enjoin defendant from utilizing the vacated portion. The Court said at page 566:

> The city could not irrevocably bargain away the right and duty to vacate, when occasion required it, even for a valuable consideration, any more than it could, under like circumstances, barter away its power to open streets: Penna. Hospital v. Phila., 254 Pa. 392; affirmed on appeal in 245 U. S. 20.

Finally there is the case of *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission,* 168 Pa. Superior Ct. 360, 78 A. 2d 46 (1951). The Public Utility Commission had ordered the Philadelphia Suburban Water Company to remove its pipes from a portion of state highway, at its own expense, because the highway was to be reconstructed by the Department of Highways. The Court reiterated the principle that the State cannot divest itself of its police power and cited in support thereof *Pittsburgh & Connellsville R. R. Co.,* supra.

It seems almost fundamental that the sovereign cannot contract away its police power. A contract not to exercise police power would be a divestiture of one of the basic powers and reasons for the existence of government. The absence in government of

the power to regulate for the health, safety, morals, and general welfare of its citizens, who, after all is said and done, constitute the state, amounts to a virtual denial of the existence of civilized government.

There was clearly no contract between petitioners and the Commonwealth or between George Peat and the Commonwealth and the police power as exercised by the Commonwealth was well within proscribed limits as defined by this Court and the appellate courts in Pennsylvania.

Section 8 of the Pennsylvania Limited Access Highway Act Which Defies Payment for Consequential Damages Neither Denies Petitioners Due Process nor Equal Protection of the Laws

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The pertinent portions of the Act of 1945, May 29, P. L. 1108, § 8, 36 P.S. 2391.8, reads as follows:

> The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by the change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political sub-

division of the Commonwealth, which assumes such responsibility by proper resolution or ordinance.

The Petitioner notes that the above-cited act uses the word "property" as distinguished from the use of the word "land". Respondent agrees that the word "property" is a more general term and would include certain incorporeal rights and easements not necessarily encompassed within the meaning of the word "land". However, distinctions of this sort, while often meritorious and of great legal importance, have no merit in the instant case. As was seen in the first part of respondent's argument, the Pennsylvania courts have held from early times that the right of which Petitioners claim to have been deprived, is not such a right, the taking of which is compensable. Thus, Petitioners are legally availed of little or nothing by the distinction made.

Petitioners also refer to the cases of *Griggs v. County of Allegheny,* 369 U. S. 84, 7 L: Ed. 2d 585 (1962), and *Gardner v. Allegheny County,* 382 Pa. 88, 114 A. 2d 491 (1955). Both cases held, in effect, that the utilization of air space above a property, by airplanes flying so low, as in taking off or landing, as to substantially interfere with the landowner's use and enjoyment of his property constitutes a compensable taking of a property right. Respondent has no quarrel with the holdings of these two cases. However, it is respectfully submitted that they have no application here. There is no doubt but that there are property rights, the taking of which is compensable, and that such rights may be other than ownership of

the land itself.' Still, there is no escaping the conclusion that petitioners rights do not fall within the latter category. As noted earlier, the damages suffered by petitioners are noncompensable, and thus distinguishable from the air space cases.

Petitioners further cite *Pennsylvania Coal Company v. Mahon,* 260 U. S. 393, 67 L. Ed. 322 (1922), as a landmark case in the development of the protection of private property against overzealous use of the police power. The *Mahon* case involved the validity of a Pennsylvania statute which forbade the mining of anthracite coal in a way as to cause a subsidence of, among other things, structures used for human habitation. The defendant [below] coal company, had years previously executed a deed conveying the surface on which the plaintiffs' [below] house was constructed. The deed expressly reserved the right to remove all the coal under the surface and the grantee expressly waived any right to damages arising from such mining. The plaintiff filed a bill in equity to enjoin the defendant from mining the coal. Plaintiff admitted the provisions of the deed, but contended that the statute, which was an exercise of the police power, took away the coal company's rights under the deed. The Court of Common Pleas held that the statute as applied to the case was unconstitutional, but the Supreme Court of Pennsylvania reversed. This Court reversed the Supreme Court of Pennsylvania. It was held that there are situations in which the exercise of the police power goes too far; so far as to amount to a taking and therefore the act becomes one under the power of eminent domain, for which

compensation must be made. The *Mahon* case is clearly distinguishable from the case at bar. The coal company was deprived of a tangible, corporeal right. Ownership of coal is meaningless without the right to mine it. The petitioners in the case at bar have not lost any tangible, corporeal right. They have lost a convenience and no more. Thus, Petitioners statement on page 23 of its petition, to the effect that *Sauer v. New York,* supra, has been strictly limited by *Mahon* is without merit. *Sauer* and the other similar cases cited in the first two topics of this brief denied property owners compensation for consequential damages. There was no question of consequential damages in *Mahon.* Rather, the coal company therein was directly and harshly forbidden to mine its coal, and as this court noted, "for practical purposes, the right to coal consists in the right to mine it".

As a further attack upon the Limited Access Highways Act, supra, Petitioners allege that it deprives them of the equal protection of the laws. It is respectfully submitted that this court should, if for no other reason, refuse to consider this allegation, because this most serious and fundamental issue was not timely raised. This allegation was made for the first time in petitioners' brief before the Supreme Court of Pennsylvania. Petitioners are actually before this Court upon petition to review dismissal of Petitioners' exceptions to an award of a board of viewers (R. 99a and 103a), which dismissal was affirmed by the Supreme Court of Pennsylvania. The exceptions alleged three reasons which are as follows:

1. The award is contrary to the facts adduced.
2. The award is contrary to the applicable law.
3. The award is inadequate.

Obviously the only reason which is even remotely connected with a denial of constitutional rights is reason number two. However, this reason is so vague that it could not be said to fairly include within it, an allegation that exceptants had been denied the equal protection of the law. As this court said in *Ellis v. Dixon,* 349 U. S. 458, 99 L. Ed. 1231 (1955), at page 462, "What has been alleged is entirely too amorphous to permit adjudication of the constitutional issue asserted." The writ of certiorari in *Ellis* which had initially been granted was then dismissed as improvidently granted.

Continuing with their allegation that they have been deprived of the equal protection of the laws, petitioners allege that the statute in question provides a procedure by which the Secretary of Highways may purchase property for constructing limited access highways, but makes no provision for the purchase of property upon conversion of an existing road to a limited access highway. Initially it must be noted that even if this reason contained any merit, which respondent denies, it would have no application to petitioners claims and would therefore be moot and academic in these cases. This court does not sit to decide moot or academic issues. *Rice v. Sioux City Memorial Park Cemetery,* 349 U. S. 70, 99 L. Ed. 897 (1955). Otherwise, the fallacy in Petitioners' contention is that the portions of the parkway upon which

their properties abut were always limited access. In fact, the parkway had always been, from its inception, limited access at the points on which it abuts Petitioners' tracts. The Township road on which the barricade was actually erected, never was and is not now a limited access road. Thus, contrary to Petitioners' assertion, no existing road has been converted to a limited access highway. However, respondent notes, as a point of information, that this Court in *Martin v. Creasy,* 360 U. S. 219, 3 L. Ed. 2d 1186 (1959), implied that a total deprivation of access, resulting from the conversion of an existing highway to a limited access highway constituted the compensable taking of a property right. With this implication, respondent agrees. This court in *Creasy,* did no more than to reverse an order of the Federal District Court for the Western District of Pennsylvania, enjoining the appropriate officials of the Commonwealth of Pennsylvania from erecting a limited access fence in front of complainant's property, thereby, depriving him totally of access. Petitioners herein point out that Mr. Justice Douglas dissented in part in *Creasy,* and would have determined in that proceeding whether access rights constituted property in the constitutional sense. It is respectfully submitted that the access rights referred to in that dissenting opinion were the access rights of abutters, who had been totally deprived of all access. Thus in *Creasy* they would have been deprived of private access while in this case the access blocked off is a public road. Petitioners are *not* in the same position factually or legally as the landowner in *Creasy.* Petitioners' access to the streets and roads on which they abut *on all sides* is no differ-

ent today than it was on the days on which they respectively purchased their tracts of land.

Petitioners also argue that they are deprived of the equal protection of the laws because the Limited Access Highways Act denies compensation for consequential damages when no property is taken, and the Act creating the Pennsylvania Turnpike Commission, Act of 1937, P. L. 774, No. 211, 36 P.S. 652, provides that the Turnpike Commission shall be liable for consequential damages absent a taking of property. In *Ewalt v. Pennsylvania Turnpike Commission,* 382 Pa. 529, 115 A. 2d 729 (1955), the Pennsylvania Supreme Court held, inter alia, that the Pennsylvania Turnpike Commission being an instrumentality of the Commonwealth, was not liable for consequential damages. It is noted that the Turnpike Commission was held liable for damages caused by a trespass and not by the exercise of the power of eminent domain. Therefore, the distinction which Petitioners make is nonexistent.

Finally, in support of their allegation of denial of equal protection, Petitioners attack that section of the Limited Access Highways Act, supra, which permits the Secretary of Highways to enter into cost-sharing agreements for property damages, with officials of political subdivisions, which assume such responsibility by resolution or ordinance. This allegation, as the first relative to equal protection raised by Petitioners, is academic. For that reason alone it should be ignored. *Rice v. Sioux City Memorial Park Cemetery,* supra. The Secretary of Highways did not enter into any such agreement with any political

subdivision in this case and therefore the question of the validity and constitutionality of such an agreement is not before this court. Respondent does note, however, that its position is that the damages payable under a cost-sharing agreement would be only those for which the Commonwealth would otherwise be liable. The import of the attacked provision was clearly not to make the Commonwealth liable for consequential damages. This conclusion must be reached in light of the specific language of this very section, prohibiting payment of consequential damages by the Commonwealth.

With reference to the vague and inconclusive implication that the latter section discussed paves the way for evil and malicious proliferation of political discrimination and influence, the record in this proceeding is fortunately devoid of any such charges. Such charges were never made prior to their appearance in appellants' brief for the Supreme Court of Pennsylvania. They are completely without factual or legal substance and should be ignored.

This Court has previously sanctioned the distinction between direct and consequential damages and such distinctions are reasonable and do not constitute a denial of equal protection of the laws. This Court said in *Marchant v. Pennsylvania Railroad Company*, supra, at page 389:

> The two classes of complainants differed in the critical particular that one class suffered direct and immediate damage from the construction of the railroad in such a way as to exclude

them from the use of their accustomed highway, and the other classes suffered damages which were consequential on the use by the defendant company of their franchise and their own property. The question thus raised is within the case of Missouri v. Lewis, 101 U. S. 22, where it was said that "the clause in question means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances.

Petitioners have not been treated any differently nor does the statute in question treat them differently than any other property owner on Bell Road, on the Parkway, or for that matter anywhere in the Commonwealth of Pennsylvania. The classification is reasonable, predicated upon strong legal and practical bases, has been approved by this Court in prior decisions, and should again be affirmed here.

CONCLUSION

Respondent respectfully submits that Petitioners have not raised any substantive federal question or any question not previously ruled upon by Your Honorable Court in a manner contrary to Petitioners' allegations. Respondent therefore respectfully urges that Your Honorable Court deny the Petitions for Writ of Certiorari and dismiss the appeals.

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